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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

NO. 82 6556

DOUGLAS EDWARD GRETZLER,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

CARY SANDMAN
McCARTHY & SANDMAN
124 West Cushing Street
Tucson, Arizona 85701
(602) 623-0341

Attorney for Petitioner,
Douglas Edward Gretzler

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner's convictions in the State of California may be used as a basis for the imposition of the death penalty when the Arizona trial judge found that the California convictions were obtained in violation of Boykin v. Alabama and its progeny.

2. Is it a violation of the federal double jeopardy clause for the Court, in a death penalty resentencing proceeding, to find "aggravating circumstances" that were expressly rejected at the first sentencing proceeding?

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IN THE

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NO. _____

DOUGLAS EDWARD GRETZLER,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arizona entered on January 6, 1983.

CITATION TO OPINIONS BELOW

The opinions of the Supreme Court of Arizona are reported at _____ Ariz. _____, _____ P.2d _____ (1983) filed Jan. 6, 1983, reproduced in appendix A; State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980) and reproduced in appendix B; State v. Superior Court, 128 Ariz. 583, 627 P.2d 1081 (1981) reproduced in appendix C.

JURISDICTION

The final judgment of the Supreme Court of Arizona was entered on January 6, 1983, and is set out in appendix A hereto. A timely motion for rehearing was denied on Feburary 16, 1983. The Arizona Supreme Court's order denying rehearing is set out in appendix D. This petition for certiorari has been filed within sixty (60) days of the Arizona Supreme Court's denial of the motion for rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the petitioner's convictions in the State of California may be used as a basis for the imposition of the death penalty when the Arizona trial judge found that the California convictions were obtained in violation of Boykin v. Alabama and its progeny.

2. Is it a violation of the federal double jeopardy clause for the Court, in a death penalty re-sentencing proceeding, to find "aggravating circumstances" that were expressly rejected at the first sentencing proceeding?

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States (appendix E, F and G, respectively) and Sections 13-454 and 13-703 of the Arizona Revised Statutes (appendix H and I, respectively).

STATEMENT OF THE CASE

This is a petition for writ of certiorari to review the judgment of the Arizona Supreme Court entered on January 6, 1983, affirming petitioner's sentence to death.*

The facts which give rise to the petitioner's conviction and sentence are set forth in the opinions of the Court below. The Court is referred to appendix A [the Arizona Supreme Court's first opinion affirming the petitioner's conviction, 126 Ariz. 60, 612 P.2d 1023 (1980) and appendix B the Arizona Supreme Court's opinion following resentencing, _____ Ariz. _____, 659 P.2d 1 (Jan. 6, 1983)].** As the Arizona Supreme Court's opinions did not reflect the evidence offered in mitigation at the petitioner's resentencing, the petitioner has attached portions of some of the briefs filed below at Appendix J so as to fairly characterize the mitigating evidence.

The instant prosecution resulted from the kidnapping of VINCENT ARMSTRONG and the murders of PATRICIA and MICHAEL SANDBERG in Tucson, Arizona, on November 3, 1973.

The petitioner and his co-defendant, WILLIE STEELMAN, were apprehended in San Joaquin County, California, on November 8, 1973, where they were charged with the slaying of nine people, in Lodi, California. The instant prosecution was delayed pending the California prosecutions.

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* Petitioner's present execution date is May 23, 1983.

** In the first Gretzler opinion, the Arizona Supreme Court affirmed the petitioner's conviction, but vacated the petitioner's death sentence and remanded for a new sentencing in light of this Court's holding in Locket v. Ohio, 438 U.S. 586 (1978). (Appendix A).

Petitioner was appointed an attorney, GEORGE DEDEKAM. On June 6, 1974, prior to his extradiction to Arizona for the instant prosecution, the defendant was convicted of and received nine concurrent life sentences for the nine counts of first degree murder in San Joaquin County, California. The California convictions resulted from the petitioner's change of plea on June 6, 1974, before JUDGE PAPAS in the Superior Court of San Joaquin. Prior to pleading guilty, the petitioner was aware of the pending murder charges in Arizona and both he and his attorney had been advised that Arizona had a death penalty.

During the change of plea proceedings the defendant was advised of the following by JUDGE PAPAS:

The Court: "Now Mr. Gretzler and Mr. Dedekam, if it has been explained to you, alright but if not, I would like to explain to you, that you understand that the pleas you have entered in this proceeding, of course, will not affect any other charge or charges which may be pending in any other jurisdiction? You understand that?

Gretzler: Yes.

The Court: This only takes care of the matters that are before this Court in this County.

Gretzler: That means that they do not affect either way?

The Court: That's right. That's correct. It has nothing to do with any other proceeding which may or has been initiated. Excuse me. I've been advised by counsel there is some proceeding in another State. And there is some proceeding in one or two other counties. Now I am not certain of that. But you understand, of course, whatever action is taken here, and your plea here does not affect those proceedings at all. You understand that?

Gretzler: Right, I understand that."*

Thereafter the defendant's pleas were accepted and he was convicted of the nine counts of murder in San Joaquin County, California.

Petitioner was convicted in November of 1975 of the two counts of first degree murder in Tucson, Arizona. On November 16, 1976, in accordance with the bifurcated procedures set forth in A.R.S. §13-454 (now §13-703) the petitioner was sentenced to death for the crimes of first degree murder.

The trial judge followed the procedures set forth in A.R.S. §13-454 (now §13-703). The statute requires a separate sentencing trial before the trial judge. The Court was required under the then existing statute to return a special verdict setting forth its findings as to the existence or nonexistence of the statutorily listed aggravating and mitigating circumstances. The Court was required to impose a sentence of death if the Court found one or more aggravating circumstances and that there were no mitigating circumstances sufficiently substantial to call for leniency. (A.R.S. §13-454(D) now §13-703).

The trial judge at the first sentencing trial found the existence of two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency. The aggravating factors found by

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* The convictions in California were however used as a basis for the petitioner's death sentence, herein.

the Court were:

> "1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposible.
>
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person."
>
> [A.R.S. §13-454(E)(1)(2)]

The Court rejected and refused to find the other listed aggravating circumstances set forth in the statute, the urging of the prosecution to do otherwise, notwithstanding. [The special verdict of the trial judge at the first sentencing is set forth in its entirety at appendix K.]

The evidentiary basis for the aggravating circumstances found at the first sentencing were the nine California convictions to which the defendant had pled guilty in June of 1974. These were the same convictions that JUDGE PAPPAS made sure that the petitioner understood could not be used in any other proceeding.

The petitioner's conviction and death sentence were appealed and the Supreme Court of Arizona vacated this death sentence and remanded in view of this Court's decision in Locket v. Ohio, supra.

Thereafter, the trial court conducted an extensive evidentiary hearing with respect to the validity of the petitioner's California convictions.

The defendant testified that he had not been properly advised by his California attorney that the convictions

in California could be used under A.R.S. §13-454 to form a basis for aggravating the sentence in support of the death penalty.* The defendant further testified that had he known that the nine California convictions were to be used to enhance sentence under A.R.S. §13-454 that he would not have pled guilty.** To make matters worse, the petitioner was advised by the Superior Court judge in California, who knew the use of the convictions was of significance to the defendant, that the pleas would not affect any other charge or charges pending in any other jurisdiction.

Following extensive hearings with regard to the validity of the California pleas, the trial judge found that the defendant was misled as to the consequences of his guilty pleas in as much as the convictions would affect the instant prosecution by being offered into evidence to establish the first two aggravating circumstances

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* GEORGE DEDEKAM, petitioner's California attorney, died from lung cancer several months after terminating his representation of the petitioner.

** The record from the evidentiary hearings leaves some suggestion that the petitioner was never advised that the convictions could be used against him in Arizona because his attorney had concluded that principles of ex post facto would have prevented the utilization of the California convictions for enhancement purposes in Arizona. His reasoning was grounded on the fact that the acts which gave rise to the California convictions occurred after the acts which gave rise to the Arizona prosecution. Counsel believed that only convictions which stemmed from acts occurring prior to the Arizona prosecution could be used to enhance sentence. This, of course, proved not to be the case. Arizona Courts have rejected that interpretation. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980).

as set forth in A.R.S. §13-454 [now A.R.S. §13-703(F)]. The trial judge concluded that the guilty pleas to the nine counts of first degree murder in California were not knowingly, intelligently, and voluntarily made and that the convictions were constitutionally infirm. As such, the trial court ruled that the convictions could not be used to enhance punishment and could not be used as a basis for the imposition of the death penalty in Arizona, citing Burgett v. Texas, 398 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). [The trial court's findings of fact and conclusions of law with respect to the validity of the petitioner's California convictions are set forth in their entirety at appendix L.]

The prosecution sought to have the trial judge's ruling with respect to the prior convictions set aside and an interlocutory appeal or special action to the Arizona Supreme Court challenging the ruling was taken.

The Arizona Supreme Court accepted jurisdiction. In an opinion set forth fully in appendix C and cited as State v. Superior Court, 128 Ariz. 583, 627 P.2d 1081 (1981), the Arizona Supreme Court set aside the trial court's order and directed that he utilize the prior convictions notwithstanding the finding that the pleas which lead to those convictions were not knowingly, voluntarily, and intelligently made.

On October 23, 1981, the petitioner was resentenced to death. The trial court rendered its special verdict. The Court found as aggravating circumstances in support of the death sentence the existence of the California convictions

and, in addition two additional aggravating circumstances that he had rejected at the first sentencing. The additional aggravating circumstances were (1) that the petitioner committed the offenses as consideration for the receipt or in consideration of the receipt of anything of pecuniary value, and (2) that the petitioner committed the offenses in an especially heinous, cruel, or depraved manner. (A.R.S. §13-454(E), now §13-703). The Court also found mitigating circumstances not found at the first sentencing hearing, finding that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law were significantly impaired. [Special verdict from second sentencing at appendix M]

Appeal to the Arizona Supreme Court followed. The Arizona Supreme Court affirmed the petitioner's death sentence on January 6, 1983.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The petitioner raised the issue with respect to the validity of his California convictions on his brief in appeal from the initial conviction and sentence. The Arizona Supreme Court declined to review the issue and all other issues related to the death sentence in its first opinion affirming the conviction when it vacated the death sentence and remanded petitioner's cause for resentencing pursuant to Locket v. Ohio, supra.

Prior to resentencing the petitioner urged the trial judge to find that the pleas were invalid. As noted

above, the Court took extensive evidence (including testimony from the California prosecutor, the petitioner, and the defense attorney for the co-defendant) and rendered its findings of fact and conclusions of law as indicated above. (See appendix L for the Court's findings of facts and conclusions of law.) The trial court's decision was reversed by the Supreme Court of Arizona (appendix C). At the petitioner's resentencing he again objected to the use of the invalid convictions. However, in view of the Supreme Court's ruling, the trial judge used the convictions in order to enhance the petitioner's sentence. The petitioner raised the question with respect to the use of the convictions again on appeal from the resentencing and in the motion for rehearing before the Arizona Supreme Court. The Court rejected the petitioner's claim.

The double jeopardy issue was preserved for this Court's review. Prior to his resentencing the petitioner urged upon the trial court that the finding of additional aggravating circumstances that the trial court refused to find in the first sentencing would violate this Court's holding in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852 (1981). The trial court rejected the petitioner's double jeopardy claim and went on to find additional aggravating circumstances rejected at the first sentencing trial (appendix M). The petitioner appealed from the trial court's ruling to the Arizona Supreme Court. The Arizona Supreme Court's judgment of January 6, 1983, rejected the petitioner's claim as did their denial of his motion for rehearing.

REASONS FOR GRANTING THE CERT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S CONVICTIONS IN THE STATE OF CALIFORNIA MAY BE USED AS A BASIS FOR THE IMPOSITION OF THE DEATH PENALTY WHEN THE ARIZONA TRIAL JUDGE FOUND THAT THE CALIFORNIA CONVICTIONS WERE OBTAINED IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER BOYKIN V. ALABAMA AND ITS PROGENY.

Petitioner's convictions in the State of California were used as a basis for the imposition of the death penalty in Arizona. Petitioner is requesting certiorari because the California convictions were obtained in violation of defendant's constitutional rights, to-wit: Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and its progeny. If this Court agrees, then these felony convictions cannot be used to enhance petitioner's sentence to death under Burgett v. Texas, 389 U.S. 109, 114, 88 S.Ct. 258, 261, 19 L.Ed.2d 319 (1967).

The Arizona trial court agreed with the petitioner's position and found that the California felony convictions were constitutionally infirm under Boykin v. Alabama. However, the Arizona Supreme Court reversed. State v. Superior Court of State of Arizona, Etc., 128 Ariz. 583, 627 P.2d 1081 (1981).

Significantly, the Arizona Supreme Court did not disturb the factual findings of the trial court regarding the circumstances under which the plea was accepted by the California trial judge. Rather, the Arizona Supreme Court ruled as a matter of law that the guilty pleas were constitutionally valid. Petitioner submits that the Arizona Supreme Court misapplied the law to the trial court's findings of facts.

Before analyzing the Arizona Supreme Court's legal conclusion, it is critical to understand that the trial court considered ample evidence to show that the petitioner was actively, not passively, misled by his own attorney and very significantly by the sentencing California trial judge regarding the effect of his guilty pleas on proceedings in Arizona. Despite Arizona law to the contrary, to-wit: A.R.S. §13-454, petitioner's defense counsel in California concluded that the California convictions could not be used to enhance petitioner's sentence in Arizona. What is most astounding, however, are the actions of the California trial judge. The California trial judge considered it important to inform petitioner as to the effects of his guilty pleas in the Arizona proceedings. After a bench conference between the Court and counsel at petitioner's change of pleas in California, the trial court sought to make sure that the petitioner understood that the guilty pleas could not be used in any other proceeding. The petitioner responded: "That is, they do not affect it either way?" The trial court responded: "That's right. That's correct. It has nothing to do with any other proceeding which may or has been initiated. . ."

Based on this record, the Arizona trial court found that the guilty pleas were obtained in violation of petitioner's constitutional rights pursuant to Boykin v. Alabama, supra. Specifically, the Arizona trial court found:

> "That by being so advised, the defendant was misled as to the consequences of his guilty pleas inasmuch as the convictions thereon will affect the instant proceedings by being offered in evidence to establish the first two aggravating circumstances set forth in subsection F of A.R.S. §13-703, to-wit:

'1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.'

That the defendant's guilty pleas to nine counts of first degree murder in California were not, therefore, knowingly, intelligently and voluntarily made, and the convictions thereon are constitutionally infirm."

[See the full text of the trial court's findings of facts and conclusions of law at appendix L] [Emphasis added]

The Arizona Supreme Court unequivocally affirmed the factual findings of the trial court.* Without reservation, the Arizona Supreme Court accepted the trial court's findings that the petitioner was misled by the trial judge as to the effect of his California guilty pleas upon the imposition of the death penalty in Arizona. In its review of this matter, the Arizona Supreme Court stated in its opinion (appendix C at p. 5), that:

"There was sufficient evidence from which it could be found by the trial judge that at the time of sentence in California the defendant was confused, if not misled as to the effect of his guilty plea in California upon the imposition of the death penalty in Arizona should he later be convicted of the charges which were then pending before the Arizona courts."

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* The factual findings of the trial court are particularly significant because the entire plea to the nine counts of murder was done orally without a written plea agreement. Relying on the record available, JUDGE DRUKE undoubtedly concluded that the representations as to the use of the California convictions in Arizona were a material part of the plea. He thus found the plea was not knowingly, intelligently, or voluntarily made.

There is not one iota of evidence to suggest that the Arizona Supreme Court disagreed in any way whatsoever with the trial court judge's factual findings.

The Arizona Supreme Court did reverse the trial court, however, based upon its interpretation of legal principles to the facts of this case. It is this application of the law that is at issue. Specifically, the Arizona Supreme Court determined that the California judge had no duty to explain accurately the consequences of defendant's guilty plea to him:

> "The law does not require a judge in one state to accurately explain the law of the sister state before a plea of guilty to a crime in the pleading state may be accepted as voluntary."
>
> [Appendix C at p. 6] [State v. Superior Court, supra, at 627 P.2d at 1083]

The underlying premise may very well be correct, that is, that the California judge may have had no duty to explain the law to the petitioner before accepting his guilty plea. But, in this case, the California judge actively undertook such a duty by explaining to the petitioner the effect of the guilty plea upon his proceedings in Arizona. Once the California judge undertook such a duty, surely he had a duty to accurately state the law. Indeed it is because of the petitioner's reliance on his attorney's representation and on the judge's explanation, a material part of the plea agreement, that the petitioner was induced to plead guilty. Further, there is the strong suggestion that the judge thought that the petitioner's understanding of the consequences of his plea on the

Arizona proceedings was significant to defendant's knowing and intelligent waiver of his constitutional rights.*

The Arizona Supreme Court relied on United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) as the basis for its opinion. In Timmreck, supra, the United States Supreme Court held that a judgment of guilty based upon a plea of guilty was not invalid because of a technical violation of Federal Rule 11(F), and was not subject to collateral attack. State v. Superior Court, 627 P.2d at 586 . Timmreck, supra, however does not support the conclusion reached by the Arizona Supreme Court in this case.

Defendant Timmreck sought relief on the gounds that the trial judge had technically violated Federal Rule 11 by accepting his plea without informing him of the mandatory special parole term. Timmreck's attorney testified that he probably informed Timmreck of the mandatory special parole term and Timmreck made no claim that he was actually unaware of the special parole term or that if he had properly been advised by the trial judge he would not have pled guilty. His sole claim was that there had been a "technical" breach of Rule 11(F). United States v. Timmreck, supra, 441 U.S. at 784.

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* That the judge explained the consequences of the plea to the petitioner after a bench conference with counsel raises a strong suggestion that the judge thought that petitioner's understanding of the consequences of his plea on the Arizona proceedings was significant to the waiver of his rights. Trial judges uniformly draw attention to special matters that are significant to defendants during change of plea procedures, especially if those matters are relied upon by defendants as part of their decision to plead guilty.

There are several critical distinctions between Timmreck, supra and this case. First, Timmreck involved a violation of a technical rule of federal procedure, not a constitutional imperative. In this case, there is no question that the California judge actively misled petitioner as to the consequences of his plea. Petitioner testified and the trial judge undoubtedly agreed that the defendant would not have pled guilty if he knew that the California convictions could be used to enhance any sentence he received in Arizona. Accordingly, the circumstances of this case go to the heart of whether or not the plea was voluntarily, intelligently, and knowingly made.*

Supreme Court opinions have uniformly granted great constitutional protection to a defendant when he pleads guilty. Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942); Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948); Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). Guilty pleas are serious business consisting of waivers of fundamental rights and inherent adjudicative elements. Santobello, supra, United States v. Bowler, 585 F.2d 851, 853 (7th Cir. 1978). Among others, the fundamental right to a jury trial, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444,

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* Again, it is not claimed and it would not be material that JUDGE PAPAS' statements were designed either to mislead the defendant or to induce the plea. The only question is whether or not it had the effect on the defendant. See United States v. Tateo, 214 F.Supp. 560, 565-66 (S.D. N.Y. 1963).

20 L.Ed.2d 491 (19 68), defendant's privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and the Sixth Amendment right of the defendant to confront his accusers, Boykin v. Alabama, supra, Pointer v. Texas, 38 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, to present witnesses in one's defense, Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, to remain silent, Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, and to be convicted by proof beyond all reasonable doubt, In re Windship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1927) are waived.

It is far more than an admission; it is consent by the defendant to conviction without a trial. Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970).

For a waiver of these constitutional rights to be valid it must not only be voluntary, but also a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. Brady, supra, 397 U.S. at 748, 90 S.Ct. at 1468.

The effective waiver of constitutional rights are governed by federal standards. Marshall v. Lonberger, (slip op. decided Feb. 22, 1983), Boykin v. Alabama, supra, 395 U.S. at 243.

For many decades, since Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927), this Court has recognized that unfairly obtained guilty pleas in federal courts must be vacated. Accord Santobello, supra; Machibroda, supra; Von Moltke, supra; Waley, supra.

In determining whether a guilty plea has been unfairly obtained and therefore an ineffective waiver of defendant's

rights this Court has for many years scrutinized the conduct of the prosecution. This Court has, without hestitation, vacated guilty pleas because the prosecutor has threatened physical harm, Waley, supra; the prosecutor has threated to use false testimony, Waley; the prosecutor has threated to bring additional prosecutions, Machibroda, supra; or when the defendant has not been warned of his right to counsel, Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (19 41).

However, this Court has also made it clear that a prosecutor's promise may deprive a guilty plea of the "character of a voluntary act". Machibroda, supra, 386 U.S. at 493, 82 S.Ct. at 513. Santobello, supra, 404 U.S. at 266, 92 S.Ct. at 501. Empty promises made by prosecutors as to sentencing and other consequences of a defendant's guilty plea have been the subject of strict scrutiny in the Courts. Machibroda, supra, Santobello, supra, Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973), United States v. Bowler, 585 F.2d 851 (7th Cir. 1978). See also Palermo v. Warden, Greenhaven State Prison, 545 F.2d 286 (2nd Cir. 1976), petition for certiorari dismissed 431 U.S. 911, 97 S.Ct. 2166, 53 L.Ed.2d 221 (1976); Geisser v. United States, 513 F.2d 862 (5th Cir. 1975). Very meticulous standards of promises and performance in a plea agreement must be met by the prosecutor. In Santobello, supra, the defendant pled guilty to possession of gambling records in the second degree after negotiating a deal with the prosecutor that all of the more serious charges would be dismissed and the prosecutor would agree to make no recommendation at to sentence. None of this

was in the record. However, at the sentencing, a new prosecutor recommended the maximum sentence and the judge imposed the maximum sentence. The Court held that the interests of justice and the proper recognition of a prosecutor's duty in relationship to promises made in connection with any agreement as to a plea of guilty required that the judgment be vacated. In so ruling, the Court emphasized its concern with promises made by the prosecution in the plea agreement process:

> "[The acceptance of a plea of guilty] must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promissory agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."
>
> [Santobello, supra, 404 U.S. at 262, 92 S.Ct. at 499]

An analysis of the voluntariness of a guilty plea and the waiver of fundamental constitutional rights by the defendant does not stop with the prosecution. Such judicial scrutiny must extend to all of the participants including defendant's counsel and the judge. In Brady v. United States, supra, the Court placed the participation of the prosecution, the defendant's own counsel and the Court on a par. This Court ruled that it was essential to consider:

> ". . . the actual value of any commitments made to him [the defendant] by the court, prosecutor or his own counsel . . . "
>
> [Brady v. United States, 397 U.S. at 753, 90 S.Ct. at 1472]

In Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), this Court ruled that a genuine issue as to the voluntariness of a guilty plea was raised based on the promises of the defense counsel to him corroborated by consultations with the judge and the prosecutor.

Indeed, this Court has never made a distinction between the promises of the prosecutor and the promises of the sentencing judge. The very rationale behind the acceptance of plea bargaining by the Courts would preclude such a distinction. The quid pro quo for the acceptance of a guilty plea by the defendant without a trial by judge or jury is that the plea is voluntarily made and that any waiver of defendant's constitutional rights is made knowingly and intelligently. See for example United States v. Mercer, 691 S.2d 343 (7th Cir. 1982). In Mercer, the defendant pled guilty to a felony and received a sentence of 15 years. Prior to accepting the plea, the Court had assured the defendant that he would receive no more than 10 years. The Seventh Circuit held that the plea was an unconstitutionally inadequate basis for defendant's imprisonment because the promise of a judge had induced the defendant to plead guilty. In so ruling, the Seventh Circuit noted the strong significance of a judge's assurances:

> "Appellant does not claim a mere technical violation of the formal provisions of Rule 11. The error committed below is of constitutional magnitude, since the waiver of defendant's constitutional rights were based on a promise that was unkept, and the actual consequences of pleading guilty were contrary to the consequences conveyed to the defendant by the district court

prior to the acceptance of the guilty plea. The realities vitiate the knowing voluntary nature of defendant's guilty plea."

[United States v. Mercer, supra, 691 F.2d at 347]

See also United States v. Gilligan, 256 F.Supp. 244 (S.D. New York, 1956). In Gilligan, supra, prior to defendant's guilty plea, the judge promised him a maximum of a ten year sentence. The judge sentenced him in violation of that promise. The District Court held that the plea was involuntary because of the breach of the judge's promise:

"A guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act. Theplea is so interlaced with the promise that one cannot be separated from the other; remove the promise and the basis for the plea falls."

[United States v. Gilligan, supra, 256 F.Supp. at 253, 254]

[Accord United States v. Tateo, 214 F.Supp. 560 (S.D. New York 1963); Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963); United States v. Lias, 173 F.2d 685 (4th Cir. 1949).

What we have here is far cry from the mere technical violation alleged in Timmreck, supra. The issue here is whether defendant's guilty plea in California survives the rigors of constitutional scrutiny, not technical violations of procedural rules.

Besides the enormous constitutional considerations involved with the acceptance of the petitioner's guilty pleas by the California court, there is a second consideration which distinguishes this case from Timmreck. Unlike this case, Timmreck, supra, involved no lower court factual

finding that the defendant relied on the advice of his defense counsel or the judge or indeed that the plea was not knowingly, voluntarily, or intelligently made. This Court has over and over again recognized and emphasized the deference to be accorded to the trial judge when making evaluations of this nature. Again, very recently, this Court emphasized that deference to the trial court judge in the area of making determinations as to the voluntariness of the guilty plea. Marshall v. Lonberger, supra, (slip op. at pp. 11-12):

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature:
>
> > 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of assertaining the truth . . . how can we say the judge is wrong? We never saw the witnesses . . . . The sophistication and sagacity of the trial judge the law confides the duty of appraisal.'"
>
> [Boyd v. Boyd, 252 N.Y. 422, 429 (United States v. Oregon Medical Society), 343 U.S. 169, 180-181 (1952), Marshall, supra, at p. 11-12]

Here the trial judge was in the best position to evaluate the plea.

Third, unlike Timmreck, the petitioner in this case has suffered prejudice in the most severe degree because he would never have pled guilty if he had been given correct advice and the trial judge had so found. In Timmreck, there was no such viable claim. In fact, defendant's attorney testified that he probably advised the defendant of all the applicable penalties and the defendant never claimed that he would not have plead guilty if he was correctly advised.

In this case, the entire and extensive dialogue that occurred between the judge and the defendant amply demonstrates the concern of the defendant about the consequences of the California guilty plea on the proceedings in Arizona. In fact, everyone agrees, including the Arizona Supreme Court, that the defendant was misled as to the effect of his guilty plea upon the proceedings in Arizona. State v. Superior Court of the State of Arizona, Etc., supra, 128 Ariz. at 585.

Finally this case, unlike Timmreck, involves the imposition of the death penalty. Because death cases have consequences of such finality, this Court has gone to extraordinary measures to ensure that the petitioner's sentence to be executed is afforded full protection of all constitutional guarantees. Eddings v. Oklahoma, _____ U.S. _____, 102 S.Ct. 869, 878 (1982) (O'Connor, J. concurring). See also Gardner v. Florida, 430 U.S. 349, 357-58, _____ S.Ct. _____ (1977) (plurality Op.); id. at 363-364 (White, J., concurring). This Court in Gardner, supra, eloquently stated its concern about constitutional protection to defendants who face a death sentence:

> "Death, in its finality, differs more from life imprisonment than a hundred year prison term differs from one of only a year or two. Because of that qualitative, difference there is a corresponding difference in the need for reliability and the determination that death is the appropriate punishment in a specific case."
>
> [Furman v. Georgia, id. at 304-305] [Emphasis added] [Gardner, supra, 430 U.S. at 363]

The breach of the judge's promise in this case did not lead to an extra ten, 20, 50, or even 100 years being added on to defendant's sentence in Arizona; rather, the breach of the judge's promise led to the enhancement of defendant's sentence in Arizona to death. Timmreck, supra, as such, is in a totally different category than this case.

Conclusion

This Court has readily and repeatedly granted a strong constitutional shield to defendants when they plead guilty to ensure that the guilty plea is voluntary and is a knowing and intelligent waiver of his fundamental constitutional rights. Without hesitation, this Court has extended that shield to cases where defendant's guilty plea has been induced by prosecutorial misconduct. Waley v. Johnson , supra; Von Moltke v. Gillies, supra; Machibroda v. United States, supra.

This Court has also, without hesitation, extended this constitutional protection to defendants where guilty pleas have been induced by prosecutorial promises, especially as to sentencing, even absent any prosecutorial misconduct. Machibroda v. United States, supra; Santobello v. New York, supra.

Further, in the course of its rulings, this Court has placed the participation of the prosecution, defendant's own counsel, and the Court on an equal basis, Brady, supra, and has suggested that judicial promises in Court in corroboration with defendant's own counsel's advice

raise an issue as to the voluntariness of the guilty plea. Blackledge, supra. In fact, this Court has never made a distinction between the promises of the prosecution and the sentencing judge in determining whether a guilty plea meets federal constitutional standards pursuant to Boykin v. Alabama, supra, and its progeny.

Petitioner now sets the stage for this Court to affirmatively allow the constitutional shield of Boykin v. Alabama to embrace the situation where (1) it is explicitly found by the trial court and affirmed by the Court of Appeals that defendant in his oral plea agreement was misled by the promises of a judge on the record as to the effects of the acceptance of the guilty plea on proceedings in another state; and (2) that the promise induced defendant to plead guilty and defendant would not have pled guilty but for that promise; and (3) the breach of this promise made the difference between life and death in the original sentencing proceedings in the other state.

The entire history and rationale supporting the acceptance of guilty pleas by defendants who voluntarily accept conviction and waive fundamental and grave constitutional rights insist on the extension of Boykin v. Alabama to this case. If this Court so finds, the defendant's guilty pleas should not be used to enhance the sentence to death under Burgett v. Texas, supra.

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF IT IS A VIOLATION OF THE FEDERAL DOUBLE JEOPARDY CLAUSE FOR THE TRIAL COURT IN A SECOND DEATH PENALTY PROCEEDING TO FIND "AGGRAVATING CIRCUMSTANCES" THAT THE PROSECUTOR ATTEMPTED TO PROVE BUT THAT WERE EXPRESSLY REJECTED AT THE FIRST SENTENCING PROCEEDING.

Petitioner's rights under the double jeopardy clause were violated at the second sentencing hearing. Petitioner was originally sentenced in 1978 under the 1973 Arizona death penalty statute which requires the sentencing court to "return a special verdict setting forth its findings as to the existence or nonexistence" of each of six statutorily specified aggravating circumstances. See Arizona Revised Statutes §13-454(C) (now A.R.S. §13-703(D). [Appendix H and I] At petitioner's first sentencing hearing, the Court found that the State had proved the existence of only the first two aggravating circumstances specified in former A.R.S. §13-454, that:

> "1. The defendant has been convicted on another offense in the United States for which under Arizona law sentence of life imprisonment or death was imposable.
>
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person."

These aggravating circumstances were based on petitioner's nine California guilty pleas which are discussed above.

The Court also specifically found that the State had not been able to prove the existence of any of the four remaining aggravating circumstances set forth in the statute. [See the Court's special verdict after first sentencing, Nov. 15, 1976, Appendix K]

Petitioner's original sentence was vacated by sua sponte order of the Arizona Supreme Court in State v.

Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) cert. denied, 440 U.S. 924 (1979). The Arizona Supreme Court further ordered that petitioner be resentenced in accordance with its opinion in Watson.

At petitioner's resentencing hearing, the prosecution sought to prove aggravating circumstances which it had attempted to prove at the first sentencing but that the Court expressly found did not exist. The sentencing Court accepted the proof over petitioner's objection and ultimately returned a special verdict which listed two additional aggravating circumstances which had been found not to exist at the first sentencing proceeding. Petitioner argued below that this was a violation of his rights under the double jeopardy clause and contrary to this Court's recent decision in Bullington v. Missouri, 451 U.S. 430 (1981). [See special verdict of resentencing at appendix M]

In Bullington, this Court extended the protection of the Fifth Amendment's double jeopardy clause to sentencing proceedings. Bullington held that the prosecution could not again seek the death penalty after defendant's retrial where the initial sentencing proceeding resulted in a sentence of life imprisonment. In so holding, this Court focused on the nature of the sentencing hearing at issue, finding that Missouri's separate, adversarial sentencing procedures had important similiarities to a trial on the issue of guilt or innocence. The key aspects of the Missouri sentencing proceeding are captured in the following passage from Justice Blackman's opinion in Bullington:

> "The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held and the jury was presented both a choice of two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like, the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statute.
>
> [Id. at 1858] [Emphasis added]

This Court concluded that the prosecution's failure to "prove its case" in the defendant's first sentencing hearing barred its attempts to again seek the death penalty in defendant's resentencing hearing. Again, the focus of this Court's double jeopardy analysis was on the similarities between the Missouri sentencing procedures and a trial on the issue of guilt or innocence:

> "By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case' . . . .[T]he sentence to life imprisonment which petitioner received at his first trial meant that 'the jury has already acquitted the defendant of whatever was necessary to impose the death sentence'."
>
> [Id. at 1861] [Emphasis in original]

The Missouri capital sentencing procedure at issue in Bullington and the Arizona procedure involved in this case are strikingly similar:

1. In both Missouri and Arizona the sentencing body's discretion is limited to two choices: life imprisonment without the possibility of parole for an extended period of time, or the death penalty;

2. In both Missouri and Arizona a separate, adversarial sentencing hearing with many of the hallmarks of a trial on the issue of guilt or innocence is held;

3. Under both the Missouri and Arizona procedures the prosecution has the burden of proving beyond a reasonable doubt the existence of certain specified aggravating circumstances;

4. Finally, although the sentencing body's discretion is restricted under both procedures, both Missouri and Arizona permit the sentencing body to determine whether any mitigating circumstances exist and whether they outweigh the aggravating circumstances.

Given these similarities, the holding in Bullington applies with equal force to the Arizona sentencing procedures. Thus, the protections of the double jeopardy clause should have been available to petitioner during his second sentencing hearing.

Indeed, as noted by JUDGE ADAMS in his dissent in Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982), the case for applying federal double jeopardy principles to the Arizona sentencing procedure is even stronger:

> "The court [in Bullington] placed great emphasis on the trial like nature of the Missouri death sentencing procedure precisely because that similarity supported the inference that a life sentence arising out of the proceeding was in effect an acquittal of the factual predicate for a death sentence [citation omitted]. Here we are not confronted with the task of uncovering the precise predicate of a sentence; rather, in the present situation we have explicit factual findings of the sentencing judge at the initial hearing as to the existence or nonexistence of each enumerated aggravating circumstance.

[citation omitted]. If the life sentence in Bullington constituted, for purposes of double jeopardy, an 'acquittal' of aggravating circumstances that would be necessary to sustain a death sentence, it is difficult to suggest . . . that an explicit finding at a sentencing hearing as to the nonexistence of an aggravating circumstance . . . is not an 'acquittal' of that aggravation, and of any death sentence based even in part on that aggravation."

[667 F.2d at 1267] [Emphasis added]

Thus, application of the double jeopardy clause to the Arizona sentencing procedure is even more clearly mandated under the Bullington analysis, the Ninth Circuit's decision in Knapp v. Cardwell, supra, to the contrary notwithstanding.

If Bullington applies to the Arizona death penalty sentencing proceedings, the sole remaining question is whether the double jeopardy clause is violated in this case where the government failed to prove certain aggravating circumstances at petitioner's first sentencing hearing but was nevertheless permitted to prove them at the second sentencing hearing. Although this Court has never squarely addressed this issue, we believe that this is the classic case of precisely what double jeopardy is intended to prevent: the State missing on the first swing and then, wholly on its own motion, taking a second swipe at the same defendant. As was stated in Swisher v. Brady, 438 U.S. 204 (1978), the double jeopardy clause means that one fair shot is enough and the State is forbidden a "second crack". Id. at 215-216. See also Green v. United States, 355 U.S. 184 (1957), ("The underlying idea . . . is that the State with all its resources and power

should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . " id. at 187).

Furthermore, the decision of several federal and state courts suggest that the federal double jeopardy clause does prevent precisely what occurred here: the State failing to prove part of its case in one sentencing hearing and then taking a second shot at the same defendant upon resentencing. Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), cert. granted, 102 S.Ct. 2927 (1982, vact. and remanded (Jan. 17, 1983); French v. Estelle, 692 F.2d 1021 (5th Cir. 1983). See also dissenting opinion of Judge Adams, Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982, cert. denied (appendix N); Cooper v. State, 631 S.W.2d 508 (Tex Cr.App. 1982); Ex Parte Augusta, 639 S.W.2d 481 (Tex CR.App. 1982).

In Bullard v. Estelle, supra, the Fifth Circuit has held that it is a violation of the double jeopardy clause to permit the State, at resentencing, an opportunity to prove an enhancement allegation it failed to prove at the first sentencing.

In Cooper v. State, supra the Court refused, under Bullington, to allow the State to prove at a resentencing hearing the existence of a prior conviction that the State failed to adequately prove at the first sentencing.

> "We therefore hold, as a matter of federal constitutional law compelled by Bullington that if the State fails to sufficient prove all facts necessary to find an enhancement paragraph 'true' the State may not at a new year in that cause, have a second opportunity to prove original allegations."
>
> [Cooper v. State, supra, at 514]

In all the cases cited above: Cooper v. State, supra, Ex Parte Augusta, supra; Bullard v. Estelle; French v. Estelle, supra, the focus is on "habitual offender" statutes. In those cases the State failed to adequately prove the existence of one of the defendants' prior convictions and those courts have interpreted Bullington as preventing the State from attempting to prove at resentencing what they failed to prove at the first.

The cases emphasize that the State should not be able to have a second chance at proving an enhancement paragraph true. The same is true here. The State failed to prove allegations at the first sentencing. They "failed to prove enhancement paragraphs true", Ex Parte Augusta, supra, at 484.

There now appears to be a growing conflict as to the full import of the Bullington ruling. See Knapp v. Cardwell, supra; (J. Adams dissenting op.); Linam v. Griffin, 685 F.2d 369, 376-79 (J. Anderson concurring); Ex Parte Augusta, supra; French v. Estelle, supra; contra, Knapp v. Cardwell, supra, (majority opinion); Linam v. Griffin, supra, (majority opinion); Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982) [holding that double jeopardy does not attach to aggravating circumstances in a death penalty case].

The following passage from Cooper reflects what is at stake in this case:

> "To allow the State to attempt at a new hearing to produce the proof that it could not produce at the initial hearing is to again subject the defendant to jeopardy. Bullington tells us that the double jeopardy clause can apply to punishments when the punishment depends on whether the State has proved or failed to prove specific

> punishment allegations. When the punishment does depend on such allegations and the State fails to prove them initially, the State may not attempt to make the defendant endure a relitigation of the issue."
>
> [631 S.W.2d at 513]

Petitioner believes that the above passage correctly states the Bullington analysis as it applies to this case and requests relief from the opinions of the Arizona Courts to the contrary.

CONCLUSION

Based on the foregoing reasons, this Honorable Court should grant petitioner's Writ Certiorari.

RESPECTFULLY SUBMITTED this 15th day of April, 1983.

CARY SANDMAN
Attorney for Petitioner
Douglas Edward Gretzler

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

NO. 82 6556

DOUGLAS EDWARD GRETZLER,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A:

STATE v. GRETZLER

126 Ariz. 60, 612 P.2d 1023 (1980).

126 Ariz. 60

The STATE of Arizona, Appellee,

v.

Douglas Edward GRETZLER, Appellant.

No. 3750.

Supreme Court of Arizona,
In Banc.

April 21, 1980.

Rehearing Denied June 3, 1980.

Defendant was convicted in the Superior Court, Pima County, Cause Nos. 24565 and 24567, William E. Druke, J., of burglary, kidnapping for robbery with a gun, two counts of robbery with a gun, and two counts of first-degree murder. Defendant was sentenced to death for the two counts of murder and not less than 25 years nor more than 50 years each for crimes of robbery, burglary and kidnapping to run consecutively. On appeal, the Supreme Court, [illegible], J., held that: (1) trial court did not err in denying several motions to dismiss grand jury indictments; (2) defendant's extradition rights and right to speedy trial under state rule and Federal Constitution were not violated; (3) trial court did not abuse its discretion in ordering that defendant and codefendant be tried separately and in consolidating certain crimes for trial; (4) decision that defendant was competent to stand trial was supported by evidence; (5) objections to identification witnesses should not be sustained; (6) prosecutor and trial court were not guilty of withholding information which should have been disclosed to defense; (7) defendant's claims concerning jury could not be sustained; (8) defendant's confessions were properly admitted into evidence; (9) defendant's objections to evidentiary rulings could not be sustained; (10) trial court did not reversibly err in miscellaneous rulings made during trial; (11) trial court did not err in rulings concerning expenditure of public funds for defense; (12) claims of misconduct of trial judge and prosecutor's office could not be sustained and (13) defendant was entitled to hearing based on constitutional challenge to death penalty statute.

Affirmed and remanded.

1. Grand Jury ⇐34

Where a prosecutor limits himself to only one role, his having observed part of police investigation will not disqualify him from appearing before grand jury in the role of prosecutor.

2. Grand Jury ⇐34

Prosecutors who are not presenting evidence may attend grand jury proceedings. 17 A.R.S. Rules of Criminal Procedure, Rule 12.5.

3. Grand Jury ⇐15

Ultimate question in cases where it is alleged that grand jury is tainted is whether each juror can base his decision solely on evidence presented to him and the law.

4. Indictment and Information ⇐10.1(4)

With respect to murder and other indictments, there was no evidence to indicate that grand jurors based their decisions on evidence other than the evidence presented.

5. Indictment and Information ⇐144

Motion to dismiss indictment which was not raised until six months after filing was untimely. 17 A.R.S. Rules of Criminal Procedure, Rule 12.9, subd. b.

6. Constitutional Law ⇐242.1(1)

Extradition rule which provides in-state prisoners with notice of detainers filed against them, while out-of-state prisoners are given no such notice, does not violate equal protection principles. 17 A.R.S. Rules of Criminal Procedure, Rules 8.3, 8.3, subds. a, b; U.S.C.A.Const. Amend. 14; A.R.S. § 31-481, Arts. I et seq., III(c).

7. Criminal Law ⇐1137(2)

A defendant may not obtain a continuance and then assert, on appeal, failure to comply with speedy trial rule as ground for retrial. 17 A.R.S. Rules of Criminal Procedure, Rule 8.4, subd. a.

8. Criminal Law ⇐577.10(8)

Time limit from arraignment to trial was not violated where continuances which

delayed trial were obtained by defendant as result of motions he was entitled in law to make and were "on behalf of the defendant." 17 A.R.S. Rules of Criminal Procedure, Rule 8.4, subd. a.

9. Criminal Law ⇐577.11(4)

Rule which requires trial within 150 days of issuance of warrant does not apply to defendants being held without the state when the warrant is issued. 17 A.R.S. Rules of Criminal Procedure, Rule 8.2, subd. a.

10. Criminal Law ⇐577.11(4)

Incarceration in another jurisdiction does not abrogate state's duty to seek early determination of charges against defendant.

11. Criminal Law ⇐577.11(4)

Statutorial limit of 150 days from issuance of warrant to trial was not violated since the time defendant was incarcerated out-of-state was excluded from computation of speedy trial limits. 17 A.R.S. Rules of Criminal Procedure, Rule 8.4, subd. a.

12. Criminal Law ⇐577.10(8), 577.11(4)

Defendant's federal constitutional right to speedy trial was not violated where reasons for delay were voluminous defense motions and unavailability of defendant due to charges against him in California.

13. Criminal Law ⇐622(2)

Trial court did not abuse its discretion in ordering that defendant and codefendant who were involved in murder spree should be tried separately. 17 A.R.S. Rules of Criminal Procedure, Rule 13.4, subd. a.

14. Criminal Law ⇐618

Defendant must demonstrate clear abuse of discretion with respect to trial court's decision to join offenses based on showing at time of motion is made and not what ultimately transpires at trial. 17 A.R.S. Rules of Criminal Procedure, Rule 13.3, subd. c.

15. Criminal Law ⇐620(1)

Murder and kidnapping crimes were properly consolidated for trial where they were connected together in their commission and were part of common scheme or plan. 17 A.R.S. Rules of Criminal Procedure, Rule 13.3, subds. a(2, 3), c.

16. Criminal Law ⇐625

Trial court's decision that defendant was competent to stand trial was supported by evidence which included testimony of two psychiatrists who examined defendant. 17 A.R.S. Rules of Criminal Procedure, Rule 11.1.

17. Criminal Law ⇐339.10(7)

Identification testimony of witness who shared a "crash pad" with defendant one night and spent two-and-one-half days with him in car en route to California was based on independent recollection and not on police photographs and was properly admitted.

18. Criminal Law ⇐339.10(11)

Identification testimony of witness who was kidnapped by defendant was based on his own experience and independent recollection rather than on comment of police witness that defendant was "clean cut," or on witness' glimpse of defendant just before hearing and was properly admitted.

19. Criminal Law ⇐700

Prosecutor did not improperly withhold background information on prospective jurors from defendant. 17 A.R.S. Rules of Criminal Procedure, Rules 15.1 et seq., 15.7.

20. Criminal Law ⇐700

Prosecutor and trial court did not deny defendant access to information required to be disclosed under rule or under *Brady* doctrine. 17 A.R.S. Rules of Criminal Procedure, Rule 15.1 et seq.

21. Jury ⇐103(1)

Neither prior knowledge of case nor opinion concerning defendant's guilt will disqualify juror unless there is evidence that he is unable to set aside such knowledge or opinion in evaluating evidence presented at trial.

22. Jury ⇐99(1)

Evidence was insufficient to sustain claim that jurors who tried defendant who

had been tainted by excessive pretrial publicity.

23. Jury ⇐33(1)

Use of voter registration lists as sole source of jurors is not constitutionally infirmed absent a showing of systematic exclusion in compiling such lists. A.R.S. § 21-301, subd. A.

24. Jury ⇐33(1)

Even though there may have been underrepresentation as to particular jury venire with respect to Spanish-Americans on jury, such underrepresentation was not due to systematic exclusion in jury selection process. A.R.S. § 21-301, subd. A.

25. Jury ⇐131(13)

Trial court did not abuse its discretion as to jury voir dire procedure in which each prospective juror was individually questioned from questionnaire jointly formulated by prosecutor, defense attorney and trial judge and defense attorney and prosecutor asked questions when they deemed it necessary to do so. 17 A.R.S. Rules of Criminal Procedure, Rule 18.5, subd. d.

26. Jury ⇐136(4)

Trial court did not err in limiting defense to ten peremptory jury challenges despite contention that significant prejudice among potential jurors because of pretrial publicity required more challenges. 17 A.R.S. Rules of Criminal Procedure, Rule 18.4.

27. Criminal Law ⇐854(1)

Publicity is chief factor a trial judge should consider when determining whether to sequester a jury. 17 A.R.S. Rules of Criminal Procedure, Rule 19.4.

28. Criminal Law ⇐1174(5)

Providing jury with censored newspapers during recesses so that they would not feel totally left out of news was not inherently prejudicial on ground that excisions from papers indicated to jurors the fact that the trial was newsworthy.

29. Criminal Law ⇐852

Judge's pretrial caution to jury admonishing them not to read anything about case, and informing jury that sequestration was the alternative, was not improper. 17 A.R.S. Rules of Criminal Procedure, Rule 19.4.

30. Criminal Law ⇐519(1)

A confession will be found involuntary where the court, considering all circumstances, determines that one of following factors exists: (1) impermissible conduct by police, (2) coercive pressures not dispelled, or (3) confession derived directly from prior involuntary statement.

31. Criminal Law ⇐531(3)

Evidence before trial court supported finding that defendant's confessions were voluntarily made.

32. Criminal Law ⇐641.3

An attorney need not be provided by the state to a defendant who is in custody in another state before questioning until that defendant is brought into and within custody and jurisdiction of state.

33. Criminal Law ⇐412.2(4)

Defendant's statements made while in custody in California while being questioned by Arizona authorities were not rendered inadmissible by fact that defendant had not yet been appointed Arizona counsel.

34. Criminal Law ⇐671

Once a defendant's statement has been admitted as a result of hearing outside presence of jury, defendant may not challenge statement's admissibility before jury, although he may challenge its voluntariness on cross-examination. 17 A.R.S. Rules of Criminal Procedure, Rule 16.2.

35. Criminal Law ⇐713

Trial court's action in prohibiting mention of death penalty did not unduly limit defendant's arguments with respect to voluntariness of his statements where death penalty was not a factor in defendant's confessions since he admitted that he did not know that Arizona had death penalty at time he made statements.

36. Witnesses ⇐311

Impeachment goes to credibility of witness.

37. Witnesses ⇐345(1)

Conviction of a felony is material to a witness' credibility.

38. Witnesses ⇐337(5)

A witness may be impeached by prior felony conviction even if witness is also the defendant and prior felony conviction was for crime that occurred after crime which witness is being tried as defendant.

39. Witnesses ⇐337(5)

Defendant's California convictions, based upon crimes that occurred after the crimes for which he was being tried, could be used to impeach defendant when testifying in his own behalf.

40. Criminal Law ⇐355

Evidence of voluntary intoxication is admissible only to negate specific intent. A.R.S. § 13-132.

41. Criminal Law ⇐355

Testimony concerning intoxication should be limited to time of crimes for which defendant is being tried. A.R.S. § 13-132.

42. Criminal Law ⇐355

Trial court did not erroneously limit testimony which could be offered to support defendant's drug intoxication defense where it appears that no one could testify as to effect of drugs on defendant at time of crimes. A.R.S. § 13-132.

43. Criminal Law ⇐438(5)

Admission or exclusion of photographs of murder victims is left to trial judge's discretion.

44. Criminal Law ⇐438(5)

As long as photographs of murder victims have probative value, they are admissible, even though they may arouse emotions of jury.

45. Criminal Law ⇐438(6)

Black and white photographs showing fully dressed murder victims, bound and gagged, as discovered by police, were admissible as tending to corroborate State's theory of how the homicide was committed, to illustrate and explain testimony, and to prove malice aforethought. A.R.S. §§ 13-451 to 13-453.

46. Criminal Law ⇐339.6

Despite contention that fingerprint evidence was inadmissible for lack of foundation, trial court properly admitted fingerprint evidence presented in testimony of I.D. technician.

47. Criminal Law ⇐423(1)

Witness' testimony that codefendant stated to him that car in which they were riding was stolen was admissible in defendant's trial as extrajudicial comment of coconspirator made in course and furtherance of conspiracy.

48. Homicide ⇐162
Kidnapping ⇐5

Testimony of manager of condominium complex in which murder victims lived was admissible as probative of several links in chain of events leading from kidnapping to murder.

49. Criminal Law ⇐1130(2)

Allegedly erroneous evidentiary rulings of trial court, listed in defendant's brief, presented no fundamental error. 17 A.R.S. Rules of Criminal Procedure, Rule 31.13, subd. c(1)(iv).

50. Criminal Law ⇐1169.1(5)

Evidence that defendant was arrested by California police and was held in California on Arizona indictments did not prejudice him since the fact that he was arrested by somebody prior to trial was obvious to jury.

51. Witnesses ⇐337(2)

Where defendant did not choose to raise his character as an issue and face the risk inherent in that choice, it was not error for trial court to preclude cross-examination on that issue.

52. Witnesses ⇐268(1)

Trial court did not abuse its discretion in refusing to allow defense to cross-examine witness concerning either polygraph examination he took when police investigated his kidnapping or his reasons for leaving job

with police department since neither polygraph nor job record contained any evidence relevant to defendant's guilt or innocence.

53. Criminal Law ⇐595

Trial court did not err in refusing defendant's motion to continue after jury was empaneled so that defense could obtain additional ballistics or fingerprint evidence where it was not shown how such evidence would have benefited case.

54. Witnesses ⇐297(13)

Fifth Amendment privilege is available to a convicted person when his conviction or sentence is being appealed. U.S.C.A.Const. Amend. 5.

55. Witnesses ⇐297(13)

Codefendant was entitled to claim his Fifth Amendment rights in defendant's trial where codefendant had appealed both his conviction and his sentence and they had not been finally disposed of at time of defendant's trial. U.S.C.A.Const. Amend. 5.

56. Criminal Law ⇐1170(1)

Although trial court erred in precluding codefendant from appearing before jury even though it was apparent that he would claim Fifth Amendment privilege and not testify, such error was harmless beyond reasonable doubt in view of overwhelming evidence. U.S.C.A.Const. Amends. 5, 6.

57. Homicide ⇐150

Allocation to defense of burden of persuasion as to drug intoxication defense in homicide prosecution was not impermissible where State presented evidence to prove beyond reasonable doubt every element of first-degree murder, including malice aforethought, and State was granted no presumption as to any element of first-degree murder. A.R.S. § 13-451 (Repealed).

58. Criminal Law ⇐753.2(4)

In view of substantial evidence that defendant committed crimes with which he was charged, trial court did not err in denying defendant's motion for acquittal.

59. Criminal Law ⇐829(1)

If substance of proposed instructions is adequately covered by instructions actually given by court, there is no error in their being refused.

60. Criminal Law ⇐757(5)

Jury instruction that testimony of allegedly biased witness should always be considered with caution and weighed with great care constitutes an improper comment on evidence. A.R.S.Const. Art. 6, § 27.

61. Criminal Law ⇐830

Requested instruction on felony-murder rule was properly refused in that it improperly referred to time of death of victim.

62. Criminal Law ⇐774, 789(2)

Court's reasonable doubt instruction and those covering voluntary intoxication and its effect on intent element on various crimes with which defendant was charged were not improper.

63. Costs ⇐302.4

Since defendant had been examined by two doctors to determine his competence to stand trial and whether he was *M'Naghten* sane, trial court did not err in refusing to grant further examinations at state expense. A.R.S. § 13-1673, subd. B (Repealed); 17 A.R.S. Rules of Criminal Procedure, Rule 11.3, subd. f.

64. Criminal Law ⇐1077.2(1)

Allegation that trial court erred in denying some of defendant's requests for transcripts at state expense could not be sustained since voluminous transcripts were provided defendant and he failed to show that he was denied transcripts reasonably necessary to help defense.

65. Costs ⇐302.1(5)

Trial court did not err in denying defendant's request for daily transcripts.

66. Judges ⇐49(1)

Trial judge was not required to disqualify himself from sentencing on ground that he was allegedly biased against defense by publicity utilized by prosecutor in his cam-

paign for county attorney/involved or that he himself in preparing such publicity.

67. District and Prosecuting Attorneys ⇐8

Prosecutor's office did not improperly use defendant's trial to generate publicity for prosecutor who was running for county attorney.

68. Homicide ⇐354

In view of murder spree which resulted in defendant's conviction, prosecutor's decision to seek death penalty was not an abuse of discretion.

69. Homicide ⇐354

Fact that prosecutor has discretion in charging and deciding whether to ask for death penalty does not render imposition of capital sentences unconstitutionally arbitrary.

70. Criminal Law ⇐1182

Defendant, who had been sentenced to death, was entitled to resentencing based on challenge to constitutionality of Arizona death penalty statute. A.R.S. §§ 13-451 to 13-454 (Repealed).

Robert K. Corbin, Atty. Gen. by William J. Schafer III and Crane McClennen, Asst. Attys. Gen., Phoenix, for appellee.

Hoffman & Brown, P. C. by David S. Hoffman, Tucson, for appellant.

CAMERON, Justice.

Defendant, Douglas Gretzler, was charged in two indictments by a Pima County grand jury with one count of burglary, A.R.S. § 13-302; one count of kidnapping for robbery with a gun, A.R.S. §§ 13-491, -492; two counts of robbery with a gun, A.R.S. §§ 13-641, -643(B); and two counts of first degree murder, A.R.S. §§ 13-451, -452, -453.[1] After jury verdicts and judgments of guilt, Gretzler was sentenced as follows: death for the crime of first degree murder, two counts; not less than twenty-five years nor more than fifty years each for the crimes of robbery, burglary and kidnapping, to run concurrently. Notice of appeal to this court was filed by the Clerk of the Pima County Superior Court pursuant to Rule 26.15 of the Arizona Rules of Criminal Procedure, 17 A.R.S.

The defendant raises some fifty-four questions on appeal. For purposes of convenience, we have grouped these questions under the following headings:

1. Challenges to the Grand Jury.
2. Extradition and Speedy Trial.
3. Consolidation and Severance.
4. Defendant's Competence to Stand Trial.
5. Objections to Identification Witnesses.
6. Alleged Failure of the State to Make Full Disclosure to the Defense.
7. Claims Concerning the Jury.
8. Admissibility of Defendant's Confessions.
9. Objections to Evidentiary Rulings.
10. Challenges to Miscellaneous Rulings Made During Trial.
11. Objections to Rulings Involving the Expenditure of Public Funds for the Defense.
12. Alleged Misconduct of Trial Judge and Prosecutor's Office.
13. Constitutionality of the Death Penalty.

The acts on which the instant prosecution was based were the kidnapping of Vincent Armstrong and the murders of Patricia and Michael Sandberg in Tucson, Arizona, on 3 November 1973. These crimes were but two events in an essentially undisputed chain of episodes involving Douglas Gretzler and Willie Steelman. See *State v. Steelman*, 120 Ariz. 301, 585 P.2d 1213 (1978). Gretzler and Steelman were responsible for the deaths of at least seventeen human beings in the autumn of 1973.

In late December of 1972, Gretzler abandoned his wife and infant daughter in New

1. Except where otherwise noted, Title 13 citations in this opinion are to the Arizona Criminal Code as it existed prior to its extensive revision effective 1 October 1978.

York City, leaving no word of his intentions or whereabouts. He drove to Casper, Wyoming, and then to Denver, Colorado, where he met and moved in with Willie Steelman and Steelman's sister. At this point, Gretzler's criminal record consisted of minor traffic charges and one count of vagrancy.

On 11 October 1973, Gretzler, Steelman and a woman friend left Denver for Phoenix, Arizona. In Globe, Arizona, the two men committed an armed robbery of a sunbathing couple; the robbery netted them five dollars. Later on the same day, they picked up a hitchhiker, tied him to a tree and stole his clothes, a ring and twenty dollars. On 15 October, the trio arrived in Phoenix where they pawned the ring and robbed a woman of twenty dollars and some checks.

Shortly after the trio's arrival in Phoenix, the woman set forth on her own. Steelman and an Arizona acquaintance known as "Preacher" went out to settle a drug-related dispute involving Preacher's brother. Both Preacher and his brother died in the resulting melee.

Through two young men, Ken Unrein and Mike Adshade, Gretzler and Steelman learned that acquaintances of Steelman named Bob Robbins and Yafah Hacohen were living at an area trailer park. All four visited the couple. Following the visit, Gretzler and Steelman kidnapped Unrein and Adshade in their Volkswagen van and drove to Stanislaus County, California, where, on 17 October 1973, the pair garroted and stabbed Unrein and Adshade to death. They hid the bodies and continued to drive the Volkswagen until it stopped running, at which point they began to hitchhike. On 20 October, they kidnapped a young couple who stopped for them near Petaluma, California. Steelman raped the woman captive, but eventually both victims were released at an underground garage, where Gretzler and Steelman stole another car.

Concerned that Bob Robbins and Yafah Hacohen would eventually connect them with the disappearance of Unrein and Adshade, Gretzler and Steelman decided to return to Arizona and silence the couple. On the way to Phoenix, they picked up a hitchhiker named Steve Loughren. The three stayed overnight with Robbins and Hacohen; the following evening, Gretzler and Steelman murdered Loughren in an isolated area near the Superstition Mountains. They then returned to their friends' trailer. On 25 October, while Hacohen was at work, they garroted and shot Robbins to death and hid his body. When Hacohen returned home, she, too, was murdered.

Gretzler and Steelman then moved on to Tucson where they shared a "crash pad" with some local street people. On 2 November, while hitchhiking with some of their Tucson acquaintances, they were picked up by Gilbert Sierra, whom they murdered later that night. They drove the victim's car to a parking lot, where they wiped their fingerprints off the vehicle and abandoned it.

On 3 November, Gretzler and Steelman kidnapped Vincent Armstrong who stopped for them while they were again hitchhiking. Armstrong escaped from his moving car and notified police of his abduction and the theft of his vehicle. His captors drove his Pontiac Firebird to a Tucson condominium complex, where Michael Sandberg was washing his white Datsun in the parking lot. They parked the Firebird in an inconspicuous corner of the lot and forced Sandberg to take them to his condominium where his wife Patricia was studying. While in the Sandbergs' home, Gretzler dyed his blond hair to brown. Both he and Steelman changed from jeans to slacks and coats belonging to Michael Sandberg. They bound and gagged both hostages, Michael on his bed and Patricia on the living-room couch. When night fell, Gretzler shot Michael in the head, muffling the gun with a pillow. He then shot Patricia, who was entirely covered by a blanket. Steelman took the gun and fired one more shot into her body, to make certain she was dead. The two then wiped down the condominium in an attempt to eliminate their fingerprints, gathered together credit cards, checks, a camera and other items belonging

to the Sandbergs, and drove away in the couple's car.

They went to the place where they had arranged to meet acquaintances with whom they planned to drive to California. The only person at the meeting-place was Donald Scott, and the three set off together. Scott knew that he was riding in a stolen car, and he testified that he saw Steelman pay for motel rooms and automobile service with Michael Sandberg's American Express Card. However, Scott apparently was unaware of his companions' other crimes. He had been told by them that he was free to leave them if things became "too much" for him. Scott did leave when Gretzler and Steelman stopped for gas in Pine Valley, California. The two continued to Lodi, California, where they entered the home of the Walter Parkin family and took as hostages all present, as well as others who arrived later. Gretzler and Steelman forced Parkin to open the safe in his nearby store and stole between $3,000 and $4,000, of which Gretzler's share was about half. Afterwards, Gretzler shot to death seven adults, whom he had previously bound and gagged. He went to a bedroom where Steelman had pulled a blanket over the heads of two sleeping children, shot one of them to death and waited while Steelman shot the second.

On 8 November 1973, California police arrested Gretzler and Steelman as suspects in the Parkin homicides. In addition the two were named in Arizona warrants for crimes committed in Maricopa County. Gretzler was incarcerated in Stockton, California, the county seat of San Joaquin County, where the Parkin crimes were committed. He was appointed a lawyer, George Dedekam. On 9 November, California and Arizona authorities began intensive questioning of both suspects.

It was only after Gretzler and Steelman were arrested that the Sandberg murders were discovered. California authorities notified Pima County that the two had been driving a car registered to Michael Sandberg. Tucson police then went to the Sandberg home, where they found the couple's bodies and lifted fingerprints later determined to be those of Gretzler and Steelman. While in custody in California, Gretzler confessed to the murders of Michael and Patricia Sandberg.

On 6 June 1974, Gretzler pleaded guilty to nine counts of first degree murder for the nine California killings. A month later, judgment was pronounced in accordance with his plea, and he was sentenced to nine concurrent life sentences. Arrest warrants pursuant to Pima County indictments based on the Armstrong and Sandberg crimes were served on 17 September 1974. Gretzler was booked into Pima County Jail on 18 September 1974 and he was arraigned on 25 September 1974. Various trial dates were set and continued, and Gretzler was finally brought to trial on 14 October 1975.[2]

The jury found Gretzler guilty of all charges. After an aggravation-mitigation hearing pursuant to A.R.S. § 13-454, the court, on 15 November 1976, sentenced Gretzler to death for each of the two murders. Gretzler appeals.

CHALLENGES TO THE GRAND JURY

On 16 November 1973, a Pima County grand jury heard evidence concerning the crimes at issue here. The jury unanimously voted true bills resulting in indictments against Gretzler and Steelman for burglary, robbery, kidnapping for robbery with a gun, robbery with a gun, and two counts of first degree murder. Defendant claims that the trial court erred in denying several motions to dismiss these grand jury indictments.

a. May a prosecutor who observes part of the police investigation in a case conduct grand jury proceedings concerning that case?

William Stevens, the prosecutor who presented the State's evidence to the grand jury, was present for about an hour while

2. Neither Gretzler nor Steelman has ever been prosecuted for any crime committed in Maricopa County.

police conducted their investigation of the Sandbergs' condominium. Stevens did not direct that investigation, and he did not touch, take, or mark any evidence. Stevens did not testify before the grand jury or at trial. Gretzler contends that Stevens as a witness, should not have prosecuted a case before the grand jury and that his doing so offends due process. We do not agree.

Our Court of Appeals has held that a prosecutor who was present when a drug raid was made on the home of the defendant could properly conduct the grand jury hearing in the case:

> "While he could not testify as a witness and then act as the prosecutor at the grand jury proceedings, the mere fact that the prosecutor witnessed some of the events does not disqualify him from acting as a prosecutor as long as he limits himself to that role only." *State v. Steele*, 23 Ariz.App. 73, 77, 530 P.2d 919, 923 (1975).

[1] In the instant case, the prosecutor was merely present while others were obtaining evidence. Where a prosecutor limits himself to only one role, his having observed part of the police investigation will not disqualify him from appearing before the grand jury in the role of a prosecutor. *Steele*, supra. We find no error.

b. May prosecutors who are not presenting evidence attend grand jury proceedings?

Gretzler also contends that it was a violation of due process and Rule 12.5, Arizona Rules of Criminal Procedure, 17 A.R.S., for three Pima County prosecutors who did not actually present evidence to be present in the grand jury room. All three were authorized deputies of the Pima County Attorney.

[2] Rule 12.5, supra, lists the persons who may attend grand jury sessions:

> "No person other than the witness under examination, counsel for the witness if the witness is a person under investigation by the grand jury, prosecutors authorized to present evidence to the grand jury, the reporter, and the interpreter, if any, shall be present during sessions of the grand jury. * * *"

Rule 12.5 uses the plural form of "prosecutors," as opposed to the singular "witness under examination," "interpreter," and "reporter." We believe that the rule itself contemplates that more than one prosecutor may be present. This is in conformity with the general rule that

> "[t]he right of the prosecuting attorney to appear and assist in the grand jury investigation usually embraces assistants, deputies, and special assistants duly authorized to assist the prosecuting attorney in the performance of his duties." 38 Am.Jur.2d, Grand Jury, § 35 at 980. See *Commonwealth v. Favulli*, 352 Mass. 95, 224 N.E.2d 422 (1967); *Franklin v. State*, 89 Nev. 382, 513 P.2d 1252 (1973); *Berard v. Moeykens*, 132 Vt. 597, 326 A.2d 166 (1974).

We find no error.

c. Was the grand jury tainted by pretrial publicity?

Gretzler also contends that the grand jury members were prejudiced by news media accounts of the Gretzler-Steelman cases.

[3, 4] The ultimate question in cases where it is alleged that a grand jury is tainted is whether each "juror can base his decision solely on the evidence presented to him and the law." *State v. Salazar*, 27 Ariz.App. 620, 624, 557 P.2d 552, 556 (1976). The record indicates that the jurors were instructed as to the need for impartiality. Just prior to presenting the Sandberg case, Stevens admonished the jurors at length that they must excuse themselves if they could not decide the case solely on the evidence and without considering anything they might have learned from the news media. All the jurors agreed that they would confine their deliberations to the facts before them. There is no evidence before this court to indicate that any of the grand jurors based their decisions on evidence other than the evidence presented. We find no error.

d. Were the indictments defective?

On 21 March 1975, Gretzler moved that the murder indictment should be dismissed because the grand jury was not informed that the State intended to seek a death penalty. At the hearing on these motions, Gretzler also argued that the indictment was vague and ambiguous.

Rule 12.9(b), Arizona Rules of Criminal Procedure, 17 A.R.S., in effect at the time, provided that any challenge to the grand jury proceedings must be made within ten days after the grand jury transcript and minutes were filed. The present rule requires that the challenge be made within twenty-five days. Rule 12.9(b), Arizona Rules of Criminal Procedure, 17 A.R.S., as amended 7 May 1975. The transcripts and minutes in the instant case were filed on 17 November 1973, and the motion to dismiss the indictment was not raised until six months after the filing.

[5] The trial judge denied the defendant's motion because it was untimely, *State v. Lopez*, 27 Ariz.App. 405, 555 P.2d 667 (1976), and because he found the indictment adequate under Arizona law. Since the challenge to the grand jury was not timely, we need go no further. We find no error.

EXTRADITION AND SPEEDY TRIAL

The right to speedy trial is guaranteed to a criminal defendant. It is, however, fundamentally distinct from the other rights essential to a fair criminal trial, in that there "is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Society is concerned that criminal defendants be tried expeditiously so that dangerous offenders will be quickly restrained from further depredations. Convictions will be more reliable if based on fresh and accurate evidence, and punishments will be more effective if they closely follow culpable acts. *State ex rel. Berger v. Superior Court*, 111 Ariz. 335, 529 P.2d 686 (1974). While an innocent defendant will probably share society's concern for speedy trial, a guilty one is "usually content to allow the trial date to be continued until such time as the witnesses have * * * disappeared, the passions of the victims have cooled, and the zeal of the prosecutor has been dampened." *Berger*, supra, 111 Ariz. at 339, 529 P.2d at 690.

Gretzler contends that Arizona's speedy trial provision as set forth in Rule 8 of the Arizona Rules of Criminal Procedure, 17 A.R.S.,[3] was violated, as well as his federal constitutional right to a speedy trial.

a. Was extradition faulty because of alleged constitutional defects in Rule 8.3 of the Arizona Rules of Criminal Procedure, 17 A.R.S.?

On 19 November 1973, Detective Larry Hust of the Tucson Police Department traveled to California where he filed warrants based on the 16 November indictments against Gretzler with the San Joaquin Sheriff's Department. He personally apprised Gretzler of the Pima County charges pending against him: "I * * * showed him the charges left with the San Joaquin County Jail as a hold placed against him." Gretzler was convicted in California and sentenced on 8 July 1974. He was then extradited by Arizona and taken into custody by Arizona authorities on 17 September 1974.

[6] Rule 8.3(a) and (b), supra, provides for notice of detainer to persons held in the state, but not to persons held without the state. According to Gretzler, Rule 8.3 violates equal protection principles guaranteed by the Constitution of the United States because it provides in-state prisoners with notice of detainers filed against them, while out-of-state prisoners are given no such notice. Rule 8.3(a), supra, however, must be read in light of the Interstate Agreement on Detainers to which both California and

3. Citations to various portions of Rule 8 are as the rule existed prior to amendments of 7 May 1975, effective 1 August 1973.

Arizona are signatories. A.R.S. § 31-481 (Title 31, Ch. 3, Article 6, Agreement on Detainers); West's Ann.Cal.Pen.Code § 1389. A.R.S. § 31-481, Art. III(c) reads as follows:

"The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based."

Gretzler does not suggest that the above procedure was not, in fact, followed in his case. In addition, as we have noted, Detective Hust testified that he personally notified the defendant of the charges on which the instant prosecution was based within three days of the return of the indictments by a Pima County grand jury. We find no error.

b. Was the time limit from arraignment to trial violated?

Gretzler submits that the trial court erred in denying his motions to dismiss for violation of Arizona's Rule 8.2(a) and 8.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S. Rule 8.2(a) provides that a defendant must be tried within 150 days from issuance of the warrant, and Rule 8.2(b) provides the defendant must be tried within ninety days from his initial appearance or sixty days from arraignment, whichever is the lesser.

Gretzler's reliance upon Rule 8.2 is misplaced. Since Gretzler was being held by California authorities, Rule 8.3(a) Arizona Rules of Criminal Procedure, 17 A.R.S., not Rule 8.2, applies. Rule 8.3(a) provides that a person must be brought to trial within ninety days from the date he has been delivered into the custody of the appropriate authorities of this State. In computing this time, excluded periods are allowed by Rule 8.4 and 8.5 Arizona Rules of Criminal Procedure, 17 A.R.S. Gretzler was taken into custody by Pima County authorities on 17 September 1974. If there were no excluded periods or valid continuances, 16 December 1974 would have been the ninetieth day.

On 21 November 1974, the defense filed a motion under Rule 11, Arizona Rules of Criminal Procedure, 17 A.R.S. The resulting examinations and hearings as to Gretzler's competency for trial lasted until 11 February 1975, when he was found competent by the court. The delay from 22 November until 11 February is excluded time under Rule 8.4(a), since "filing of the motion under Rule 11 effectively stops or suspends the trial of the defendant until his mental competency is established." *State v. Landrum*, 112 Ariz. 555, 560, 544 P.2d 664, 669 (1976). See also *State v. Ceja*, 113 Ariz. 39, 546 P.2d 6 (1976); *Berger v. Rozar*, 112 Ariz. 62, 537 P.2d 932 (1975).

On 11 February 1975, Gretzler moved for suppression of all statements made by him. On 18 February, the court reset trial for 18 March 1975, to allow for the resolution of this motion. On 14 March, Gretzler filed a motion for change of venue and a hearing under *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), cert. denied 397 U.S. 965, 90 S.Ct. 1000, 25 L.Ed.2d 257 (1970). The court set the venue hearing for 21 March, took the motion to suppress under advisement, and set the Dessureault hearing for not less than two days prior to trial. Because these matters could not be resolved prior to 18 March, that trial date was vacated and the matter continued subject to call. Defense counsel stated that it "was not possible" to have his motions "heard prior to the 18th," but he indicated that he was not surrendering his right to object to any speedy trial violation.

On 9 June, the trial court granted the motion for the change of venue. On 10 June, the State moved that a trial date be set within two weeks. Defense counsel opposed the motion, arguing he had further preparation to do, and requested a September trial date. On 16 July 1975, the trial court denied defendant's motion to suppress and set trial for 2 September.

Trial did not commence on 2 September because the defense filed fourteen motions just prior to that date. One motion was for

certain transcripts; the trial court granted the motion and continued the trial to 29 September to allow the transcripts to be prepared, the other defense motions to be resolved, and a Dessureault hearing to be had. The defense at this point was still emphasizing its need for more time. The State again indicated it was ready for trial and protested the continuance. For various reasons, primarily because requested transcripts could not be available to the defense until 22 September, a week before the 29 September trial date, the defense asked for one more continuance. Trial was then set for 14 October 1975, and jury selection began on that day.

Our rule reads:

"The following periods shall be excluded from the computation of the time limits set forth in Rules 8.2 and 8.3:

a. Delays occasioned by or on behalf of the defendant, including, but not limited to, delays caused by an examination and hearing to determine competency, the defendant's absence or incompetence, or his inability to be arrested or taken into custody in Arizona." Rule 8.4(a), supra.

[7, 8] Though he urged the continuances that were granted, Gretzler now protests that the continuances were improper. A defendant may not obtain a continuance and then assert, on appeal, failure to comply with the rule as ground for retrial. See *State v. Stoneman*, 115 Ariz. 594, 566 P.2d 1340 (1977); *State v. Barnett*, 112 Ariz. 210, 540 P.2d 682 (1975); *State v. Armenta*, 25 Ariz.App. 62, 540 P.2d 1281 (1975). The continuances herein were obtained by Gretzler as a result of the motions he was entitled in law to make and were "on behalf of the defendant." Rule 8.4(a), supra. We find no Rule 8 speedy trial violation.

We must comment, however, on the delay in bringing this matter to trial. We do not criticize the prosecutor who continuously urged for an early trial. We do feel, however, that the court was lax in not insisting that the defendant, as well as the State, prepare for trial expeditiously. Admittedly, some delay was necessary because of the complex nature of the case, but a review of the record leads us to believe that the trial court did not adequately protect society's interest in a prompt determination of the accused's guilt or innocence.

c. Was the statutory limit of 150 days from issuance of a warrant to trial violated?

Defendant contends that, pursuant to Rule 8.2(a), Arizona Rule of Criminal Procedure, 17 A.R.S., every accused must be tried "within 150 days of the issuance of the warrant." The indictments on which the instant prosecution is based were issued on 16 November 1973. Three days later, Detective Larry Hust left warrants resulting from these indictments "with San Joaquin County Jail as a hold placed against Gretzler." Hust personally informed Gretzler of the Pima County charges. Gretzler was not tried until October of 1975.

[9] As noted above, Rule 8.2(a), which requires a trial within 150 days of the issuance of the warrant, does not apply to defendants being held without the State when the warrant is issued. Rule 8.3(a), Arizona Rules of Criminal Procedure, 17 A.R.S. We find no violation of Rule 8.2(a).

[10] It is contented, however, and we agree, that incarceration in another jurisdiction does not abrogate the State's duty to seek an early determination of the charges against the defendant. Our rules provide that within

"90 days after receipt of a written request from any person charged with a crime and incarcerated without the state, or within a reasonable time after otherwise learning of such person's incarceration without the state, the prosecutor shall take action as required by law to obtain such person's presence for trial." Rule 8.3(a), Arizona Rules of Criminal Procedure, 17 A.R.S.

[11] In November of 1973, evidence was presented to the Pima County grand jury which indicated Gretzler and the California authorities were notified and a "hold" placed on Gretzler. The record does not

contain any evidence that Gretzler at any time requested a transfer to Arizona for trial. Neither does the record indicate that Arizona was less than diligent in obtaining custody of Gretzler for trial. The delay complained of resulted from California's exercising its right to try and convict Gretzler before releasing him to Arizona. The Arizona authorities did not procrastinate. As soon as it became possible to obtain custody of Gretzler, the Arizona authorities moved to bring him to Arizona for trial. The time Gretzler was in California was excluded from computation of speedy trial limits because the delay was caused by the defendant's "inability to be arrested or taken into custody in Arizona." Rule 8.4(a), Arizona Rules of Criminal Procedure, 17 A.R.S. We find no error.

d. Was the defendant denied his federal constitutional right to a speedy trial?

On appeal, the defendant asserts that he was severely prejudiced by violation of his federal constitutional right to speedy trial. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

Barker v. Wingo, supra, sets forth the factors that must be weighed in determining whether federal speedy trial rights have been violated: (1) length of delay, (2) reasons for delay, (3) defendant's assertion of his right, and (4) prejudice cause to the defendant. See *State v. Soto*, 117 Ariz. 345, 572 P.2d 1183 (1977).

Of all these factors, the length of delay weighs least in the balance. *Barker v. Wingo*, supra. It serves primarily to trigger analysis. *State v. Wright*, 113 Ariz. 313, 553 P.2d 667 (1976). As our discussion of our speedy trial rules indicates, the reasons for the delay were the voluminous defense motions and the unavailability of Gretzler due to his California charges. As in *Barker v. Wingo*, supra, the record here "strongly suggests that while he hoped to take advantage of the delay * * * and thereby obtain a dismissal of the charges, [the defendant] definitely did not want to be tried." 407 U.S. at 535, 92 S.Ct. at 2194, 33 L.Ed.2d at 119. Two weeks before trial, Gretzler was still seeking continuances while the prosecution was urging that a trial date be set. There was no genuine demand that trial begin.

Gretzler contends, however, that he was prejudiced by the delay, in that psychiatrists who examined him in Arizona could not establish his state of mind at the time of the Tucson crimes. We do not find prejudice in this regard. The California psychologists who examined him within a short time after the crimes were in substantial agreement with those who examined him in Arizona.

Gretzler also claims that his California counsel, George Dedekam, died before trial and might have aided his Arizona defense. Mr. Dedekam was available to the defense for at least two months after Gretzler was brought to Arizona. Arizona counsel was granted funds to be used to go to California to talk with Dedekam, and he spent those funds.

[12] Finally, Gretzler argues that a witness, Michael Marsh, became unavailable through passage of time. Again, defense counsel in fact talked with his witness before he dropped out of sight. Counsel made no effort to record his testimony in any way and made no showing of how testimony Marsh would have given at trial would have aided the defense. The mere assertion that a witness was not available at time of trial "is insufficient to show that a denial of due process has occurred." *State v. Torres*, 116 Ariz. 377, 379, 569 P.2d 807, 809 (1977). See also *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). We find no federal speedy trial violation.

CONSOLIDATION AND SEVERANCE

When Gretzler and Steelman were returned to Arizona for trial, the Sandberg murders and the Armstrong kidnapping were filed as separate cases with Gretzler and Steelman as co-defendants in each of the two cases. Steelman and the State entered into an agreement to sever the trial of Steelman from Gretzler and to consolidate the Sandberg and Armstrong cases.

Neither Gretzler nor his attorney participated in this agreement, and Gretzler opposed both the severance of the defendants and the consolidation of the cases. The court granted the motions to consolidate the murder and kidnapping trials and to sever the trial of Steelman and Gretzler.

a. Did the trial court abuse its discretion in ordering that Gretzler and Steelman should be tried separately?

[13] Rule 13.4(a) of the Arizona Rules of Criminal Procedure, 17 A.R.S., states that "the court may on its own initiative, and shall on motion of a party," order severance when it "is necessary to promote a fair determination of the guilt or innocence of any defendant." The rule does not suggest that the co-defendant must agree to the severance, and we do not think that such agreement is required. Also, it would appear that consolidation would have been prejudicial under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton held that admission of a non-testifying co-defendant's confession may violate a defendant's Sixth Amendment right of confrontation. Gretzler's counsel stated to the trial court that, because of the co-perpetrator's voluminous statements to the police, "there was * * * as large a Bruton problem as I have ever seen in any case at any time." The court followed Rule 13.4(a) and there was no prejudice to Gretzler. We find no error.

b. Did the trial court abuse its discretion in consolidating the Armstrong and Sandberg crimes for trial?

[14] The defense also objected to the trial court's consolidating the Sandberg and Armstrong cases. Our rules provide:

"c. Consolidation. If such offenses or such defendants are charged in separate proceedings, they may be joined in whole or in part by the court or upon motion of either party, provided that the ends of justice will not be defeated thereby." Rule 13.3(c), Arizona Rules of Criminal Procedure, 17 A.R.S.

As we have stated:

"The applicant must demonstrate a clear abuse of discretion with respect to the trial court's decision to join the offenses, 'based on the showing at the time the motion is made and not what ultimately transpires at the trial.' (citation omitted)" *State v. Dale*, 113 Ariz. 212, 215, 550 P.2d 83, 86 (1976).

It is evident that the Armstrong and Sandberg crimes were both part of Gretzler's and Steelman's continuing effort to get out of Tucson without attracting police attention following the murder of Gilbert Sierra. Having no car they kidnapped Armstrong to get his Pontiac Firebird. Since Armstrong escaped them and could give police descriptions of his captors and of his stolen vehicle, they had to dispose of the Pontiac immediately. They did so by parking it inconspicuously in the lot of the Sandbergs' condominium, where Michael Sandberg was washing his own car. They forced Sandberg into his home at gunpoint, and, after changing their appearance, murdering the Sandbergs and stealing their belongings, escaped Arizona in the couple's Datson. It was the manager of the Sandbergs' condominium who first discovered Armstrong's car and reported it to the police.

[15] The Armstrong and Sandberg crimes were "connected together in their commission" and were a "part of a common scheme or plan." The offenses would have been properly joined pursuant to Rule 13.3(a)(2) and (3), Arizona Rules of Criminal Procedure, 17 A.R.S., and were properly consolidated pursuant to Rule 13.3(c), supra.

DEFENDANT'S COMPETENCE TO STAND TRIAL

On 21 November 1974, defense counsel filed a motion requesting examinations and a hearing into Gretzler's competency to stand trial, pursuant to Rule 11, Arizona Rules of Criminal Procedure, 17 A.R.S. Rule 11.1 states:

"A person shall not be tried * * * while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense."

The court granted the motion and appointed two psychiatrists to examine the defendant: Dr. Alan Beigel, requested by the State, and Dr. David B. Gurland, requested by the defense. The Rule 11 hearing was held on 11 February 1975. At the hearing, both experts testified that Gretzler was suffering from no thought disorders and that he had good recall of the events which occurred in the autumn of 1973. They agreed that he was able to understand the proceedings against him and could aid in his defense. Both psychiatrists rejected defense counsel's suggestion that Gretzler's recall of the period at issue here was greatly damaged by amphetamines he was supposed to have taken at the time. They stated that, while there were some gaps in the defendant's memory, impairment was at worst "moderate." We have stated that examinations into competency to stand trial focus

> "on an extremely narrow issue: whether whatever is afflicting the defendant has so affected his present capacity that he is unable to appreciate the nature of the proceedings or to assist his counsel in conducting his defense." *State v. Steelman*, 120 Ariz. 301, 315, 585 P.2d 1213, 1227 (1978).

[16] In the instant case, the experts agreed that Gretzler was able to understand the nature of the proceedings against him and to aid in his defense. We find that the trial court's decision that Gretzler was competent to stand trial was supported by the evidence.

OBJECTIONS TO IDENTIFICATION WITNESSES

Gretzler moved, pursuant to *State v. Dessureault*, supra, to preclude the identification of Gretzler by Donald Scott and Vincent Armstrong because of unduly suggestive police procedures. After hearing, the court denied the motions to suppress as to both Scott and Armstrong. On appeal, Gretzler contends the denial of these motions was error.

a. Donald Scott

[17] At the Dessureault hearing, Donald Scott described himself as a "fellow street person" with Gretzler and Steelman. He knew them as "Doug" and "Bill" during the time they lived in Tucson. One night he shared a "crash pad" with them, and he spent two-and-a-half days with them in the Sandbergs' car en route to California. While he had been previously shown police photographs of Gretzler, the trial court ruled that his identification of Gretzler was based on an independent recollection and not on the police photographs. The defense did not object to this ruling. We agree with the trial court. We find no error.

b. Vincent Armstrong

Vincent Armstrong testified that he stopped to pick up Gretzler and Steelman as they were standing, at midday, by the side of the road and that he spent about thirty minutes with them before he escaped. Gretzler sat next to Armstrong, in the front seat, while Steelman, in back, held a gun to Armstrong's ribs. When Armstrong claimed to be too nervous to drive, he stopped the car so that Gretzler could get out, walk around in front of the car and take over the wheel.

At the hearing, Armstrong testified that between his kidnapping and that day, he had seen Gretzler only once, when he happened to be watching a television news story concerning the California murders. Recognizing his captors, he notified Tucson police that it was Gretzler and Steelman who had kidnapped him. Prior to that time, he had worked with the police to produce composite drawings of his then unidentified assailants. At Steelman's trial, he again saw the Gretzler composite. At no time was Armstrong shown mug shots or a police line-up.

On the eve of the Dessureault hearing, Armstrong had the following exchange with a Tucson policeman:

> "ARMSTRONG: I just asked him—I said, 'I imagine—I imagine Gretzler looks different now.' And he says, 'He's been cleaned up.'"

Immediately prior to the Dessureault hearing, Armstrong caught sight of Gretzler coming out of the courtroom after another proceeding. At the Dessureault hearing, Armstrong identified Gretzler, testifying that the defendant's hair had been longer and blonder at the time of the kidnapping. He also noted that Gretzler had not worn a mustache at that time, though he wore one at the hearing. After Armstrong's testimony at the Dessureault hearing, the defense moved that his identification of Gretzler be precluded at trial because it was tainted by the comment, "He's been cleaned up," and by Armstrong's glimpse of Gretzler just before the Dessureault hearing. The court disagreed.

[18] Our review of the evidence leads us to concur with the trial court that Armstrong's in-court identification of Gretzler was based on his own experience and independent recollection. We find no error. *State v. McGill*, 119 Ariz. 329, 580 P.2d 1183 (1978); *State v. Ware*, 113 Ariz. 340, 554 P.2d 1267 (1976).

DISCLOSURE

The defendant contends that, in several instances, the Pima County Attorney's Office and the trial court were "guilty of withholding information which was valuable and in some cases essential to the defense of the matter."

Rule 15, Arizona Rules of Criminal Procedure, 17 A.R.S., governs discovery in criminal prosecutions. Section 15.1 of the rule specifically sets forth the obligations of the prosecutor to make disclosure to the defendant. As noted in the commentary to the rule, subsection 15.1(a)(7) clarifies "the prosecutor's constitutional obligations under *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." Brady held that when the defense requests evidence favorable to the accused, the prosecutor must produce all information in his possession that is "material either to guilt or to punishment." 373 U.S. at 87, 83 S.Ct. at 1197, 10 L.Ed.2d at 218. Arizona's Rule 15 reaches beyond *Brady* as to what must be disclosed [illegible] it also requires the State to make disclosure regardless of whether there is a defense request. For failure to comply with Rule 15.1, the rules provide:

> "If at any time * * * a party has failed to comply with * * * this rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances * *." Rule 15.7, Arizona Rules of Criminal Procedure, 17 A.R.S.

a. Background information on prospective jurors.

Prior to jury selection, the prosecutor and the defense counsel stipulated that the prosecutor would provide the defense with any information he had concerning the thirty-six individuals from which the ultimate jury would be selected. No such information was provided. Shortly before trial, the defense made a motion that the State disclose this material. The prosecutor stated to the court that, while he had requested a check on the thirty-six jurors, he had received no information. The prosecutor also stated he had directed the State's investigator to share his juror findings with the defense. The prosecutor participated in jury selection without any information from his investigator. After jury selection, the prosecutor stated that upon checking with the investigator, he found that a "background check" had been done on the thirty-six jurors but that there was nothing returned one way or the other. The investigator gave him no report, and he had nothing to pass on to the defense.

[19] We might rule differently if the prosecutor was using this procedure in order to withhold from the defense useful information possessed by the State's investigator. Our reading of the record leads us to conclude, as did the trial court, that there was no information to be passed on to the defense. We find no error.

b. Did the prosecutor or court deny the defendant other Rule 15 or *Brady* information?

In addition to the juror background infor-

certain other materials and "valuable information" were withheld by the State and trial court.

We have reviewed the portions of the record designated in support of this contention and in almost every instance the record to which he refers indicates that the requested information was delivered. For example, Gretzler alleges that the prosecutor refused to disclose the addresses of potential witnesses Marsh, McPeak, and Scott. The record reveals that the prosecutor agreed from the first to share this information when his office had the addresses and that he in fact did so. The defendant alleges that he was denied information from Pinal County, Arizona, police reports and from Stanislaus County, California, police reports. The record shows that the prosecution disclosed all Gretzler-Steelman police reports in its possession, as well as reports it obtained on defense request. The Pinal and Stanislaus County reports were delivered to the defense on 28 March 1975.

Gretzler also alleges that there was not adequate disclosure of the testimony of witnesses in the Steelman trial. The record shows that the prosecutor provided the defense with transcripts of all State witnesses in the Steelman trial and agreed additionally to transcribe any material the prosecution believed to be required by *Brady*, supra. At all times, the entire Steelman trial record was available for the defense.

[20] Gretzler further alleges that the State withheld its responses to motions made by co-defendant Steelman. These responses were deemed by the trial court, under its Rule 15.1(e) discretion, to be necessary to the Gretzler defense. The record shows that some of this material failed to reach the defense promptly, through no fault of the State. Gretzler received the material in time to use it for his defense. We find no error.

Finally Gretzler contends that the State withheld information concerning an organized crime "family" named Smaldone, which was supposed to exist in Denver, Colorado. Gretzler had suggested in a statement to police that he was threatened by Steelman with retaliation by the Smaldones if he did not commit the crimes in question. Gretzler also suggests that prior to sentencing the State had proof that the Smaldone family did, in fact, exist. The record before this court does not substantiate these allegations. We find no error.

CLAIMS CONCERNING THE JURY

a. Excessive publicity

Both Steelman and Gretzler filed a motion for change of venue based upon prejudicial pretrial publicity which the court granted. In order to protect the new venues from undue publicity, they were kept secret from all but the parties and court officials until trial began. Steelman was tried first, in St. Johns, Apache County. Gretzler was tried in Prescott, Yavapai County.

The distance between Tucson, the county seat of Pima County, and Prescott, the county seat of Yavapai County, is 212 miles. More importantly, the two counties are served by different metropolitan daily newspapers. Over a year had elapsed between the first Pima County newspaper stories of the crimes and the beginning of trial in Prescott on 14 October 1975. Prior to trial, one hundred prospective jurors were asked to fill out extensive questionnaires which both the State and defense helped to write. The trial judge then orally questioned each of these persons at length, supplementing his own questions with those suggested by the attorneys. Occasionally, the attorneys themselves asked questions. The original group of one hundred was narrowed to a panel of thirty-six, from which sixteen trial jurors were ultimately chosen.

No one on the thirty-six member panel indicated a knowledge of the instant case. No one knew that Steelman's trial had occurred. One person, not an ultimate juror, overheard in a coffee shop that Gretzler had been given a life sentence in California. Four panel members knew that he had been extradited from California for the present trial. Two individuals recalled Steelman's name, but knew nothing about him; and

one knew that he had been accused of murder, but not that he had been tried.

[21, 22] It would appear that this panel had substantially less knowledge of the case and the defendant than is required for a finding of jury taint. Neither prior knowledge of the case nor an opinion concerning the defendant's guilt will disqualify a juror unless there is evidence that is he unable to set aside such knowledge or opinion in evaluating the evidence presented at trial. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *State v. Smith*, 116 Ariz. 387, 569 P.2d 817 (1977); *State v. Endreson*, 109 Ariz. 117, 506 P.2d 248 (1973) (half of trial jury had knowledge of the case); *State v. Schmid*, 109 Ariz. 349, 509 P.2d 619 (1973) (all jurors had knowledge of the case). We find no error.

b. Was the jury panel unconstitutionally selected?

On 22 October 1975, Gretzler moved to quash both the panel of one hundred jurors provided by Yavapai County and the panel of thirty-six narrowed from the original group through voir dire, as being unrepresentative of the community from which they were drawn.

The statistical information submitted by Gretzler indicates that Yavapai County had an estimated population of 50,700 in 1976. The figures show that 87% of the total population is "Anglo-American," while the remainder is "Spanish-American," "Indian," "Negro," or "Other." Gretzler contends that there should have been thirteen Spanish-Americans instead of two.

In *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the United States Supreme Court held that petit juries must be drawn from a source fairly representative of the community, and that the defendant need not be a member of the group allegedly excluded in order to raise this question. The United States Supreme Court has also set forth the elements a challenger must show to establish a prima facie violation of the fair cross-section requirement. These are:

"(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579, 587 (1979).

[23] We note that jurors in Arizona were selected at that time from voter registration lists as provided in A.R.S. § 21-301(A). The use of voter registration lists as a sole source of jurors is not constitutionally infirm absent a showing of systematic exclusion in the compiling of such lists.

"* * * we note that even if defendant does establish that blacks do not register in proportion to their share of the community population, which is all he seeks to show, he will have failed to demonstrate any systematic exclusion of blacks for jury duty. Although the registered voters list from which jurors are drawn may not parallel exactly the proportion of each minority within the community, that in no way establishes or even demonstrates systematic exclusion. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). * * *" *State v. Watson*, 114 Ariz. 1, 16, 559 P.2d 121, 136 (1976), cert. denied 430 U.S. 986, 97 S.Ct. 1687, 52 L.Ed.2d 382 (1977). See also *State v. Lee*, 114 Ariz. 101, 559 P.2d 657 (1976); *United States v. James*, 453 F.2d 27 (9th Cir. 1971).

And:

"A defendant is not entitled to a jury which is composed of, with material precision, the exact proportion of his race as exists in the general population. All that is required is a jury selected by a process where the members of his race are not systematically excluded." *State v. Taylor*, 109 Ariz. 267, 272, 508 P.2d 731, 736 (1973).

[24] Even though there may have been underrepresentation as to this particular jury venire, we do not find this underrepre-

sentation is due to systematic exclusion in the jury selection process. We find no error.

c. Did the trial court abuse its discretion as to voir dire?

[25] On 13 October 1975, the defense filed a motion to "allow defense counsel to conduct a full blown voir dire examination of the jury panel." The trial court denied this motion. A written questionnaire consisting of eighty-four questions was jointly formulated by the prosecutor, defense attorney, and trial judge. Each of the one hundred original jurors answered the questionnaire. Then each of the one hundred was questioned outside the presence of the other jurors by the trial judge. The defense attorney and prosecutor asked questions when they deemed it necessary to do so. Although defense counsel did not conduct voir dire, he actively participated in the questioning of the jurors at each stage. The defense was not foreclosed from asking any relevant questions. See Rule 18.5(d), Arizona Rules of Criminal Procedure, 17 A.R.S.; *State v. Melendez*, 121 Ariz. 1, 588 P.2d 294 (1978). We find no error.

d. Did the trial court err in limiting the defense to ten peremptory challenges?

On 14 October 1975, the defense filed a motion requesting that it be allowed an unspecified number of peremptory challenges, in addition to the ten specified by Rule 18.4, Arizona Rules of Criminal Procedure, 17 A.R.S. The defense argued that the extra challenges were necessary to vitiate the impact of pretrial publicity on the jury panel. The trial court denied this motion.

[26] We have stated above that there was no significant prejudice among potential jurors from any alleged pretrial publicity. The defendant cites no authority for the proposition that the trial court should have granted him more than ten peremptory challenges provided him under Rule 18.4, nor does he suggest any way in which he was damaged by having only ten challenges rather than more. We find no error.

e. Sequestration of the jury.

On 14 October 1975, the defense moved that the jury be sequestered. This motion was denied by the trial court. Our rule states:

"19.4 Separation and detention of jurors

"The court in its discretion may permit jurors to separate or, on motion of any party, may require them to be sequestered in charge of a proper officer whenever they leave the jury box. The court shall admonish the jurors not to converse among themselves or with anyone else on any subject connected with the trial, or to permit themselves to be exposed to news accounts of the proceeding, or to form or express any opinion thereon until the action is finally submitted to them. If the jurors are permitted to separate, they shall also be admonished not to view the place where the offense allegedly was committed." Rule 19.4, Arizona Rules of Criminal Procedure, 17 A.R.S.

[27] Publicity is the chief factor a trial judge should consider when determining whether to sequester a jury. Although the publicity in Pima County was sufficient to convince the trial judge to grant the motions for change of venue, the publicity in Yavapai County was not such that it was necessary to sequester the jury. As we have indicated above, the jury panel had no members who were aware of even the bare facts of the crimes with which Gretzler was charged. The trial court cautioned the jurors at the beginning and end of every session to avoid exposure to news stories or conversations concerning the trial, in accordance with Rule 19.4, supra. After the panel of thirty-six was selected, and before the final twelve were chosen, two members of the jury responded affirmatively to the court's questions as to whether they had heard anything about the case during a week-end recess. The court promptly investigated the kind and extent of their exposure to outside information to the satisfaction of both State and defendant. The publicity was not inflammatory or excessive.

"When * * * publicity is not sensational nor inflammatory, there is no need to sequester the jury particularly when the jury has been cautioned not to read the newspapers, listen to the radio or watch television during the trial and there is no indication that the court's instructions were violated." *Collins v. State*, 589 P.2d 1283, 1291 (Wyo.1979). See also *State v. Richmond*, 112 Ariz. 228, 540 P.2d 700 (1975); *State v. Lippard*, 26 Ariz.App. 417, 549 P.2d 197 (1976); Annotation, 72 A.L.R.3d 100.

Gretzler contends, however, that because the newspapers the jury received were censored, the jury knew this was a sensational case. Just prior to the beginning of trial, the trial court explained to the jurors that they had to forego newspapers and news broadcasts for the duration of the trial. The judge informed them that newspapers in which stories concerning the case were excised would be provided for the jury to read during recesses. Censored newspapers were provided during jury selection as well. Gretzler alleges that these newspapers were themselves prejudicial because the excisions indicated to the jurors the fact that the trial was newsworthy. We do not agree.

[28] It is not uncommon to provide censored newspapers and magazines for jurors in a long trial so that they will not, as the trial court put it in this case, "feel totally left out of the news that [is] going on in the world." We believe the court's concern for the jury was commendable, and we do not believe that the excised portions of the newspapers indicated that the trial was more important than the facts presented to the jury would reasonably be expected to indicate. We find no error. See *State v. Braun*, 82 Wash.2d 157, 509 P.2d 742 (1973).

Finally, in his pretrial caution to the jury, the judge made the following statement:

"One of the ways in which a court can insure that jurors don't hear or read anything about the case while they're sitting on the jury is to sequester them, which means to put them in a hotel and not let them go home to their families and go about their daily affairs. But it is not the intention of the court to do that in this particular case. If the court finds that it loses one or two jurors because they aren't following the admonitions of the court in not talking about the case or hearing anything about it or discuss it, it may be that that admonition won't be sufficient, and that it—as to the balance of the jurors that may remain, they would have to be sequestered."

[29] Gretzler objected that this statement was a threat which would so intimidate the jurors that they would not dare reveal to the court that they had been exposed to prejudicial statements. Gretzler has shown no instance where a juror was exposed to prejudicial statements. Neither do we believe that jurors are so easily intimidated. The court merely gave them the alternative to sequestration. We find that the statement is a proper admonition of the kind contemplated under Rule 19.4, supra. We find no error.

ADMISSIBILITY OF DEFENDANT'S CONFESSIONS

On 8 November 1973, at about 10:10 a. m., Gretzler was arrested in a hotel in Sacramento, California, on warrants arising out of the murders that occurred in Maricopa County, Arizona, and San Joaquin County, California. Immediately on arrest he was advised of his *Miranda* rights. The accused was then taken to the Sacramento Police Department where he was strip-searched and again advised of his Fifth and Sixth Amendment rights. He said he understood his rights, but wished to make a statement. Gretzler was questioned two more times by California authorities about the California crimes, always after being advised of his *Miranda* rights. He was also interviewed by two California psychiatrists who later testified as to Gretzler's competency.

The following morning, 9 November, at about 10:00 a. m., the defendant was again advised of his *Miranda* rights. Once more he waived them. He was again interviewed by San Joaquin authorities, this time ac-

companied by Detectives Arellanes and Miller from Maricopa County. During this tape recorded interview, Arellanes made the following comment:

"Okay, Douglas, from what we understand you have been real cooperative with these gentlemen here and you told them—you have gone right down the line and told them everything, right? Okay. We would appreciate it at this time if you would do the same thing with us. Chances are that we may not be able to prosecute you in Arizona."

The questioning was interrupted twice. Once the defendant was taken via elevator to a courtroom in the same building for arraignment, but returned to the interview room because the magistrate was not ready for him. The second time he was taken to the court, arraigned, and appointed a lawyer.

At his Arizona voluntariness hearing, Gretzler testified that during the second elevator ride he had been coerced into admitting the Maricopa County murders:

"My hands were chained to my sides on a chain belt. I was standing in the elevator. It's got two sections, a front like out there (indicating), and the back has a cage. They put you in there and some of the guys in there grabbed me and pressed me up against the wall."

Gretzler also testified that no one ever hit him or otherwise hurt him while he was in custody. The Maricopa detectives testified at the hearing that they had told Gretzler in the elevator that they believed he was lying about the Maricopa crimes, but that there had been no physical harassment of the defendant. Up until this elevator ride, Gretzler maintained that Bob Robbins and Yafah Hacohen, the couple he and Steelman murdered in a Maricopa County trailer park, were, as far as he knew, still alive. While in the elevator, he admitted they were dead and agreed to give Arizona detectives a statement concerning their deaths.

Following his arraignment and the appointment of counsel, the two Maricopa County officers concluded their conversation with Gretzler. The newly appointed lawyer, George Dedekam, was present, as the following excerpt from a tape-recording of the session indicates:

"Detective Ambrose: Defendant Douglas Edward Gretzler. The date 11-9-73. The time is 11:50 hours. Approximately twenty minutes before this interview, another interview was held. This interview was discontinued to take Mr. Gretzler before Municipal Court Judge for his first arraignment. At this Court Attorney George Dedington (sic) was appointed as the attorney of record for Mr. Gretzler.

"Douglas, the reason I put that in the recording—the reason I've advised you and recorded on here that we went to the Court and you were appointed an attorney is because now officially you have an attorney representing you. All right, before we can question you any further we're going to contact your attorney and we're going to talk with him and have you talk with him and advise him that you are going to make further statements to us. Do you understand that?

"GRETZLER: I understand that. Now, I am willing to make a statement, with or without him.

"Q You want to make a statement with or without him; is that correct?

"A Yes, yes.

"Q All right. We're not going to ask you any questions from this point on until we have Mr. Dedekam on the phone or here in person.

"A Right.

"Q You understand that?

"A Yes, I understand that. Can I have these removed, these shackles from my legs?

"Q Beginning to bite in a little bit?

"A Yeah, they hurt. Okay, I think I'll go along with that, okay for now.

"Q The reason we're trying to get ahold of you we brought him down, he was making statements. (Talking to Dedekam)

"DEDEKAM: He indicated that I hadn't told him not to; I didn't have a chance in Court.

"GRETZLER: No, that's all right. I did it wilfully.

"DEDEKAM: Okay, no more statements, then, okay?

"DETECTIVE AMBROSE: And for your information, Mr. Dedekam, there has been no questioning at all. We advised him of this, that he would have to talk with you first.

"DEDEKAM: Seriously, okay? They do not have very many reports at this time, so it'll probably be sometime next week before I come out to see you, because I want to review the reports, before I talk to you okay?

* * * * * *

"DEDEKAM: Okay, now I'll be out to see you. A number of the inmates are going, if they're near or around you, they're going to be wanting to question you.

"GRETZLER: I'm sure, but they're not, I'm in maximum security anyway.

"DEDEKAM: Don't talk. I don't think they would be * * * if they do * *. (GARBLED)

"GRETZLER: I won't say anything.

"DEDEKAM: Then I'll be up to see you, okay?

The interview concluded about noon.

Late that night, Detectives Bunting and Tucker of the Tucson Police Department spoke with the defendant for the first time about the Tucson murders. They told Gretzler they were investigating the Sierra and Sandberg murders and that he would probably be prosecuted for these crimes. At the voluntariness hearing, Bunting testified as follows about this conversation:

"We explained to him that we could not talk to him unless he waived his rights to an attorney.

He explained his attorney advised him not to speak to anybody; that he would like to talk unofficially if he could.

We explained we could not talk unofficially; that anything he said would be used against him, and there was no way we could speak with him unofficially. We explained he had certain rights that we would have to advise him of.

He told us he had been advised of his rights many times, and that he was fully aware of his rights, and that's all he had heard since he was arrested was his rights, and that he was just completely aware of them; that he did not want to make a statement, but he would talk to us verbally.

* * * * * *

"Q What happened next?

"A After I was satisfied in my mind he knew his rights, we went ahead and spoke with him about it first explaining to him that it would be used against him."

Gretzler testified that he understood his statements could be used against him and that he spoke willingly to Bunting and Tucker. This conversation lasted about an hour; no tape recording was done because the defendant did not want the tape recorder running. At the end of the interview, Gretzler said he might be willing the next day to make a tape recording. In Bunting's words: "He wanted time to think about it and [said] to come back."

At about 1 p. m. on 10 November, Detectives Bunting and Tucker returned to talk with Gretzler to see whether he would tape-record a statement about the Tucson crime. He was advised of his rights and agreed to answer questions on tape. In this brief interview, Gretzler admitted his role in the Armstrong kidnapping and told of going to the Sandberg condominium complex afterward. He did not admit that he had entered the Sandberg home or killed the couple.

At 1:30 p. m. the same day, Gretzler was visited by California detectives Ambrose and Wagner, whom he had requested to see. He was advised of his rights and waived them both orally and in writing. It was during the long interview which followed that Gretzler first admitted his active role in the crimes of the preceding weeks; he confessed to the Lodi and Tucson murders. Gretzler made the following statements in waiving his right to counsel:

"Q All right, before we get started I want you to understand that yesterday your attorney talked with you.

"A Yes, he did.

"Q And said certain things to you.

"A Right. He advised me not to say anything.

"Q All right.

"A But I'm waiving those rights, I'm going to.

"Q All right, I'm going to advise you of your rights again, and then you can—

"A Right."

The officer then read the defendant his *Miranda* rights:

"Q I've advised you before of these rights. Do you, do you still understand those rights?

"A Yes, I do.

"Q All right, your attorney is George Dedekam?

"A Yes.

"Q Do you desire to call him at this time or would you like to just—

"A I would like to talk to him later, not at this time, I don't."

Gretzler then signed a waiver form provided by Detective Ambrose:

"DETECTIVE AMBROSE: Q Do you not desire your counsel to be here?

"A I do not, and this is voluntary."

This interview ended at about 5 p. m.

Larry Hust of the Tucson Police Department interviewed Gretzler on 19 November 1973, and Gretzler again reiterated that his statements were made voluntarily and in full knowledge of his rights.

Of the statements outlined above, three were used by the State as trial evidence. The first was the tape recording taken by Detectives Bunting and Tucker on the afternoon of 10 November. In this interview, Gretzler admitted that he had participated in the Armstrong kidnapping and claimed he was outside the Sandberg home while Steelman spent several hours inside. The second confession was made shortly after the first, to California detectives. It was Gretzler's first acknowledgement that he, himself, had murdered numerous people, including eight of the Lodi victims and both of the Sandbergs. The third statement introduced at trial was Gretzler's 19 November avowal that earlier conversations with the police had been voluntary.

a. Did the evidence before the trial court support a finding that Gretzler's confessions were voluntarily made?

Gretzler moved to suppress all statements made by him to authorities while he was in police custody. A voluntariness hearing was held and ten witnesses, including Gretzler, testified. The trial court listened to all tape recorded statements in their entirety. Following the hearing, the court found that Gretzler was fully advised of his *Miranda* rights and that he knowingly, intelligently and voluntarily waived these rights. Gretzler's motion to suppress was therefore denied. On appeal, Gretzler alleges that the trial court's finding was reversible error because it was unsupported by the evidence. We do not agree.

[30] "[C]onfessions are prima facie involuntary and the burden is on the state to show by a preponderance of the evidence that a confession was freely and voluntarily made." *State v. Edwards*, 122 Ariz. 206, 212, 594 P.2d 72, 78 (1979). See also Rule 16.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; *State v. Hall*, 120 Ariz. 454, 586 P.2d 1266 (1978). A confession will be found involuntary where the court, considering all the circumstances, determines that one of the following factors exists: (1) impermissible conduct by police, (2) coercive pressures not dispelled, or (3) confession derived directly from prior involuntary statement. *State v. Steelman*, supra, 120 Ariz. at 309, 585 P.2d at 1221. None of these factors exist in this case. Neither is a confession made involuntary by the mere fact that it was made outside the presence of an attorney. *State ex rel. Berger v. Superior Court*, 105 Ariz. 553, 468 P.2d 580 (1970).

"[A] blanket prohibition against the taking of voluntary statements or a perma-

nent immunity from further interrogation, * * * would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Michigan v. Mosley*, 423 U.S. 96, 102, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 320 (1975). See also *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), cert. denied 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978).

Gretzler was fully informed of his constitutional right to counsel and right to remain silent as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). There is no question that he understood the rights he was waiving when he confessed to the crimes he had committed in Pima County.

[31] The facts fully support the trial court's finding that the State met its burden of proving Gretzler's statements voluntary. See *State v. Sample*, 107 Ariz. 407, 489 P.2d 44 (1971). There was no error in the denial of defendant's motion to suppress.

b. Was there a violation of defendant's right to counsel, rendering his statements inadmissible?

[32] As further grounds for suppression of his California statements, defense counsel argued both at trial and on appeal that Gretzler's right to counsel was violated. He contends that "confessions obtained by Arizona authorities without the benefit of Arizona counsel," must be suppressed. The defense cites no authority to support this view. We find nothing to require that an attorney must be provided by a state to a defendant before that defendant is brought into and within the custody and jurisdiction of that state. Of course, if the defendant asks for an attorney, he may not be questioned until he has one appointed, but an attorney in the state in which he is then in custody will satisfy the requirements of defendant's right to counsel.

[33] In the instant case, we note that Gretzler, of his own accord, largely disregarded the advice to remain silent given him by his California attorney. Where waiver of right to counsel in California so unequivocally followed the proper *Miranda* warnings, subsequent statements made in California were not rendered inadmissible by the fact that Gretzler had not yet been appointed Arizona counsel.

c. Did the trial court wrongly limit the defense challenge of voluntariness of certain evidence by not allowing the defense to question its admissibility before the jury?

Gretzler argues on appeal that the trial court prevented him from adequately presenting the issue of voluntariness to the jury. At trial, the State introduced Tucson policeman Larry Hust to lay the foundation for the playing of the tape recording of the 19 November 1973 conversation between Gretzler and Hust. Defense counsel argued that he should be allowed to voir dire Hust as to voluntariness prior to the tape's being played. The judge ruled that, since he had found the statement admissible, it would be played to the jury without prior questioning by the defense. The defense would be allowed to raise the voluntariness issue in its cross-examination of Hust, after the jury had heard the recording. The defense renewed this argument as each Gretzler statement was introduced, and each time it was overruled.

We believe the judge's rulings follow from a correct interpretation of the law concerning the respective roles of judge and jury in weighing voluntariness as set forth by the United States Supreme Court in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

"The only issue decided in the *Jackson* case is the correct trial procedure when a purported confession is offered and a question is raised as to whether it is voluntary or involuntary. In *Jackson*, the Supreme Court held that when this question is raised the trial judge must first hear the evidence regarding the con-

fession outside the presence of the jury. He must then make a definite determination whether the purported confession was voluntary or involuntary. If he determines it was involuntary it may not be admitted in evidence. If he determines it was voluntary, he may admit it for consideration by the jury. He may not submit it to the jury merely upon a finding that there is a conflict in the evidence, without himself first definitely resolving the conflict." *State v. Owen*, 96 Ariz. 274, 275, 394 P.2d 206, 207 (1964). See also Rule 16.2, Arizona Rules of Criminal Procedure, 17 A.R.S.

[34] Once the court has found his statements admissible, a defendant may, of course, present evidence tending to refute the statements' validity. The jury is the ultimate arbiter of voluntariness, and is free, "in effect, [to] disagree with the judge, and reject the confession." *State v. Owen*, supra, 96 Ariz. at 277, 394 P.2d at 208. Once the evidence had been admitted as the result of a hearing outside the presence of the jury, the defendant may not challenge the statement's admissibility before the jury although he may challenge its voluntariness on cross-examination.

d. Did the court's granting the State's motion to prohibit mention of the death penalty unduly limit the defense's arguments on voluntariness?

During a recess before the playing of the Hust tape to the jury, the trial court heard a State motion in limine that there should be no reference at trial to the death penalty. The State argued that punishment is a matter for the judge and should not be considered by the jury in determining guilt or innocence. The motion was opposed by the defense, but was granted by the trial court. On appeal, the defense asserts that the court's ruling was reversible error because it precluded testimony or argument that Gretzler's confession was obtained by threats of capital punishment. In a previous case of this court we stated:

"It appears from the record that the trial court's reason for precluding evidence of the penalty the witness could have received was to prevent the jury from learning of the penalty the defendants in this case might receive if convicted of first degree murder. Whatever merit this reason may have, it cannot outweigh the right of the defendant to cross-examine the State's major witness on what he expects in return for his testimony. The fact that the witness faced a possible death penalty if he did not testify for the State surely would be a factor if not the factor in the witness's decision to testify. The trial court's refusal to allow inquiry into the penalty the witness would have faced had he not agreed to testify was reversible error." *State v. Morales*, 120 Ariz. 517, 520, 587 P.2d 236, 239 (1978).

In *Morales*, supra, the threat of the death penalty was an inducement for the witness to testify. We held that foreclosing reference to the death penalty was prejudicial to the defense and thus outweighed the policy against allowing punishment to be mentioned before a jury not charged with determining sentence.

[35] In the instant case, the death penalty was not a factor in Gretzler's confession since Gretzler admitted he did not know Arizona had the death penalty. At the voluntariness hearing outside the presence of the jury, Gretzler stated:

"Q Do you understand now what my questions are trying to find out?

"A No.

"Q The 19th was the day you gave the statement to Mr. Hust. You remember Mr. Hust with the very short haircut that came in and testified?

"A Yes.

"Q You remember giving the statement to him?

"A Yeah.

"Q That was the last statement that you gave that's been introduced into this proceeding. Is that your recollection?

"A Yeah. I think so.

"Q Prior to that, did you know that life imprisonment was the maximum penalty for the charges against you in California?

"A I guess I figured it probably was, but I wasn't sure.

"Q Between the 8th and 19th when you gave the statement to Hust, did you ever know what the penalty was for the Arizona charges?

"A For the Arizona charges?

"Q Yes, what the maximum was for those charges?

"A No, not for sure.

"Q What did you think, if you thought about it at all? Did you?

"A I figured probably—I don't know, twenty years, I don't know.

"Q Did you think about it?

"A No, not really."

We find no error.

OBJECTIONS TO EVIDENTIARY RULINGS

a. Were defendant's prior convictions admissible for impeachment purposes?

[36–39] On appeal, Gretzler renews his trial objection to a ruling that his California convictions, based upon crimes that occurred after the crimes for which he was being tried, could be used to impeach him if he testified in his own behalf. Impeachment goes to the credibility of a witness. Conviction of a felony is material to a witness's credibility. A witness may be impeached by a prior felony conviction even if the witness is also the defendant and the prior felony conviction was for a crime that occurred after the crime for which the witness is being tried as a defendant. The fact that its application may have prevented Gretzler from taking the stand is not material. *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *State v. Myers*, 117 Ariz. 79, 570 P.2d 1252 (1977), cert. denied 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978). We find no error.

b. Did the trial court erroneously limit the testimony which could be offered in support of Gretzler's drug intoxication defense?

Before ruling on a State motion in limine to preclude psychiatric testimony other than opinions as to M'Naghten insanity and competency, the court heard offers of proof and testimony of expert witnesses outside the presence of the jury. On this basis, the court admitted expert testimony as to the general impact of certain drugs on the average person. The court barred testimony as to the possible impact of certain drugs on Gretzler, because no expert could either state to a reasonable medical certainty what the impact upon Gretzler would be or had personally observed Gretzler in a drug-intoxicated state. The court also refused to allow expert opinion on personality defects other than M'Naghten insanity or incompetence. Testimony of the defendant's sister, Joanne Gretzler, as to occasions when she had seen him take drugs, was admitted over the State's argument that such evidence was too remote to have probative value; Ms. Gretzler having last seen her brother on Christmas Day, 1972. She was precluded, however, from testifying about the defendant's hospitalization for drug overdose in 1969, because she had no first-hand knowledge of that event.

At the conclusion of trial on 3 November 1975, the defense moved for a mistrial based on the court's limitation of psychiatric and lay witnesses of proof of drug intoxication. The court denied the motion.

[40–42] Evidence of voluntary intoxication is admissible only to negate specific intent. A.R.S. § 13–132. See also *State v. Steelman*, supra; *State v. Cooper*, 111 Ariz. 332, 529 P.2d 231 (1974). Testimony concerning intoxication should be limited to the time of the crime for which the defendant is being tried. *State v. Durgin*, 110 Ariz. 250, 517 P.2d 1246 (1974). In the instant case, it appeared that no one could testify as to the effect of drugs on Gretzler at the time of the crimes. We find no error.

c. Did the trial court err in admitting photographs of the murder victims into evidence?

Defendant objects to the admission into evidence of two photographs of the Sandbergs' corpses. The pictures were taken at

the couple's apartment. Each black and white photograph shows a fully dressed victim, bound and gagged, as discovered by the Tucson police.

[43-45] The admission or exclusion of photographs of murder victims is left to the trial judge's discretion. *State v. Thomas*, 110 Ariz. 120, 515 P.2d 865 (1973). As long as the photographs have probative value they are admissible, even though they may arouse the emotions of the jury. *State v. Ferrari*, 112 Ariz. 324, 541 P.2d 921 (1975). Here, as in *Ferrari*, supra, the pictures tended to corroborate the State's theory of how the homicide was committed, to illustrate and explain testimony, and to prove malice aforethought. We find no abuse of discretion in the trial court's ruling.

d. Was there adequate foundation for the admission of fingerprint evidence?

[46] At trial, the defense argued that fingerprint evidence was inadmissible for lack of foundation, in that the I.D. technician, Reese, was uncertain as to who lifted which prints. This objection is reiterated on appeal. Our reading of the trial transcript reveals that Reese clearly testified that he himself lifted all of them. His testimony fully describes the process by which each print was lifted and labelled, who labelled each print, and the location from which each was taken. The trial court properly admitted the fingerprint evidence.

e. Did the trial court err in admitting into evidence a hearsay account of a statement made by co-perpetrator Steelman?

[47] At trial, witness Donald Scott testified that while he, Gretzler, and Steelman were riding in the Sandbergs' car, Steelman said it was stolen from two people who had gone to Hawaii. Defense counsel objected that his hearsay account of Steelman's statement was erroneously admitted into evidence and argued that it was grounds for a mistrial. The court denied his mistrial motion. We agree with the trial court that the statement was admissible as an extrajudicial comment of a co-conspirator made in the course and furtherance of the conspiracy. See *State v. Speerschneider*, 25 Ariz. App. 340, 543 P.2d 461 (1975). We find no error.

f. Was the testimony of James Nelson erroneously admitted into evidence?

James Nelson, the manager of the condominium complex in which the Sandbergs lived, testified at Gretzler's trial. Nelson was not asked to identify Gretzler at trial. He testified that he was a friend of the Sandbergs, that they were students, that he saw a blue Pontiac Firebird, later shown to be Armstrong's drive into the housing complex and eventually reported its presence to the police. He also testified that he saw Michael Sandberg walk to his condominium with two men and that Sandberg did not respond to his friend's greeting. At the conclusion of this testimony, defense counsel moved that it be stricken from the record. He asserted that the testimony was irrelevant because it did not connect Gretzler to the crime. We do not agree.

[48] Nelson's testimony was probative of several links in the chain of events leading from the kidnapping of Armstrong to the murder of the Sandbergs. For example, he testified as to the approximate arrival time of the Firebird and stated that two men, at a time not long after Armstrong's kidnapping, accompanied an apparently uncomfortable Sandberg up the stairs to his condominium. Such testimony was relevant despite the fact that it did not specifically identify Gretzler. *State v. Kennedy*, 122 Ariz. 22, 592 P.2d 1288 (App.1979); *State v. Mosley*, 119 Ariz. 393, 581 P.2d 238 (1978). See also Rule 402, Arizona Rules of Evidence, 17A A.R.S.; *State ex rel. LaSota v. Corcoran*, 119 Ariz. 573, 583 P.2d 229 (1978). The trial judge did not err in refusing the defendant's motion to strike Nelson's testimony.

g. Further evidentiary issues raised on appeal.

[49] In what he calls "Issue XXXII" of his brief, Gretzler states that twenty-four

additional evidentiary rulings of the trial court were erroneous. The brief merely lists objections made at trial; the defendant in no way argues the merits of his objections. See Rule 31.13(c)(1)(iv) of the Arizona Rules of Criminal Procedure, 17 A.R.S. We have reviewed the issues and find no fundamental error.

[50] Finally Gretzler asserts, without argument, that he was prejudiced by the court's admission of evidence that he was arrested by California police. The fact that Gretzler was arrested by somebody prior to trial was obvious to the jury. We are unable to perceive how testimony that Gretzler was held in another state on Arizona indictments would damage his case before the jury.

CHALLENGES TO MISCELLANEOUS RULINGS MADE DURING TRIAL

a. Did the trial court improperly limit the scope of cross-examination?

Gretzler contends that the trial court erroneously prevented his cross-examining a State's witness as to whether Gretzler had said during a taped confession that he had never been arrested previously. Our review of the record reveals that Gretzler misstates the trial court's ruling. In fact, the court ruled that such cross-examination was improper as long as Gretzler's character was not in issue and that the court might rule differently if the defense chose to raise the issue of character.

[51] Since Gretzler did not choose to raise his character as an issue and face the risks inherent in that choice, it was not error for the trial court to preclude cross-examination on that issue. *State v. Fierro*, 108 Ariz. 268, 496 P.2d 129 (1972); *Singh v. State*, 35 Ariz. 422, 280 P. 672, 67 A.L.R. 129 (1929).

[52] The trial court also refused to allow the defense to cross-examine witness Armstrong concerning either a polygraph examination he took when the police investigated his kidnapping or his reasons for leaving a job with the Tucson Police Department. In a hearing outside the jury, it was shown that neither the polygraph test nor Armstrong's job record contained any evidence relevant to Gretzler's guilt or innocence. We have held that the

> "absolute right to cross-examine 'within the proper bounds' does not license the defendant for a fishing expedition into completely irrelevant matter." *State v. Shaw*, 93 Ariz. 40, 44, 378 P.2d 487, 490 (1963). Accord, *State v. Williams*, 120 Ariz. 600, 587 P.2d 1177 (1978). See also *State v. Robison*, 125 Ariz. 107, 608 P.2d 44 (1980).

We find no error.

b. Did the trial court err in refusing a defense motion to continue after the jury was impaneled?

On 22 October 1975, after the jury was impaneled, the defense moved that the trial be continued. The two chief grounds for the request were that the defense was unable to find Michael Marsh, whom it wished to call as a witness, and that the defense wanted to obtain the results of ballistics and fingerprint tests prior to making an opening statement. The trial court, which, as we have discussed above, had been generous in granting continuances prior to impanelment of the jury, denied the motion.

[53] The statement taken by police from the missing witness, Michael Marsh, indicates that his testimony would have been cumulative to that of Joanne McPeak and Donald Scott, who did testify at trial. In addition, there is "no indication that this testimony would influence the outcome of the trial or would otherwise be helpful to the defendant." *State v. Lacquey*, 117 Ariz. 231, 235, 571 P.2d 1027, 1031 (1977). See also *State v. Ebert*, 110 Ariz. 408, 519 P.2d 1149 (1974). Gretzler has not shown that either the ballistics or the fingerprint evidence would have benefited his case. We find no error.

c. Did the trial court err in upholding Willie Steelman's assertion of a Fifth Amendment right to remain silent when called to testify at Gretzler's trial?

Prior to trial, the defense notified the State that it intended to subpoena Gretz-

ler's codefendant, Willie Steelman, to testify at Gretzler's trial. Steelman, both personally and through his attorney, on Fifth Amendment grounds, consistently maintained that he would not testify or even speak to Gretzler's counsel.

The State made a motion in limine to preclude Steelman's appearing before the jury, if he intended to do no more than invoke his Fifth Amendment privilege. The trial court held a hearing outside the jury to determine whether Steelman still intended to remain silent. At this hearing, Steelman refused to utter a word. His attorney stated that he had advised his client to invoke the Fifth Amendment in order to protect his rights on appeal. Gretzler moved that, faced with Steelman's silence, the court order him to testify or order an examination into his competency. The court denied Gretzler's motions. Gretzler maintains that the judge erred in denying his defense motions to order Steelman to testify or to have him examined for competency.

[54] The Fifth Amendment privilege is available to a convicted person when his conviction or sentence is being appealed. See *State v. Moncayo*, 115 Ariz. 274, 564 P.2d 1241 (1977); *State v. Cota*, 102 Ariz. 416, 432 P.2d 428 (1967), cert. denied 390 U.S. 1008, 88 S.Ct. 1256, 20 L.Ed.2d 109 (1968). See also *Cota v. Eyman*, 453 F.2d 691 (9th Cir. 1971).

[55] In the present case, Steelman appealed both his conviction and his sentence, and they had not been finally disposed of on appeal. In these circumstances, he was entitled to claim his Fifth Amendment rights. The trial court correctly denied the defense motion to order Steelman to testify or undergo an examination for competency.

d. Did the trial court err in precluding Steelman from asserting his Fifth Amendment privilege in the presence of the jury?

The trial court also granted the State's motion in limine to preclude Steelman from appearing before the jury if he intended to remain silent. Gretzler contends that this was error and we agree. The "privilege against self-incrimination is a personal immunity for the witness and does not disqualify him from being called * * *." *State v. Cota*, supra, 102 Ariz. at 421, 432 P.2d at 433. In *State v. Ortiz*, 113 Ariz. 60, 546 P.2d 796 (1976), the trial court ruled that the defense should be precluded from calling two witnesses who would certainly invoke their privilege against self-incrimination. We reversed on Sixth Amendment grounds. We held that while the defendant's Sixth Amendment right to call witnesses would not enable him to force them to speak, he was entitled to show that he had presented "all the relevant evidence at [his] disposal." *Ortiz*, supra, 113 Ariz. at 61, 546 P.2d at 797.

[56] We believe the trial court erred in precluding Steelman from appearing before the jury even though it was apparent that he would claim the privilege and not testify. We do not believe, however, that this error reasonably could be thought to have "contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86–87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171, 173 (1963). The defense in the instant case was deprived of only the bare right to show Steelman to the jury. It was not likely that Steelman's absence would have any weight whatever on the trial. Gretzler did not indicate, by means of an offer of proof, what he hoped to gain from Steelman or the questions that would be asked of him. Gretzler's conviction was based on solid evidence, including eye witness testimony, his use of property stolen from victims, fingerprints, and copious statements from Gretzler himself. Steelman's non-appearance at trial could not have contributed to the verdict. We believe that while the trial court erred in denying Gretzler's Sixth Amendment right to compel witnesses in his behalf, *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Ortiz*, supra; this error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 711 (1967). See also *Harrington v. California*,

395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

e. Did the trial court require Gretzler to offer proof on any element of first degree murder?

The State brought evidence to prove beyond a reasonable doubt every element of first degree murder, including malice aforethought. A.R.S. § 13-451. The defense then had the opportunity to present evidence of drug intoxication to negate the State's evidence of specific intent.

Gretzler argued that the allocation to the defense of the burden of persuasion as to drug intoxication was impermissible under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). In *Mullaney*, the United States Supreme Court invalidated a newly revised Maine murder statute which allowed the jurors to presume malice from a deliberate killing and required the defendant to negate this presumption by proof that he acted in the heat of passion. In *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), however, the court upheld a New York murder statute requiring the state to prove the intent element and establishing extreme emotional disturbance as an affirmative defense the defendant must prove by a preponderance in order to reduce the crime to manslaughter. The United States Supreme Court held that defendants may be required to prove affirmative defenses where the prosecution is required to prove intent, and every other element of the crime charged, beyond a reasonable doubt. *Patterson*, supra. See also *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952).

[57] The procedure followed at Gretzler's trial is distinguishable from the Maine procedure condemned by *Mullaney*. Here the State was granted no presumption as to any element of first degree murder. As in *Patterson*, the State was required to prove intent beyond a reasonable doubt. We find no error.

f. Did the trial court err in denying Gretzler's motion for acquittal?

[58] At the conclusion of the State's case, Gretzler made a motion for judgment of acquittal. The court denied this motion and the defense now argues that the denial was error. We do not agree. There was substantial evidence that Gretzler committed the crimes with which he was charged. *State v. Parker*, 113 Ariz. 560, 558 P.2d 905 (1976). We find no error.

g. Did the trial court err in instructing the jury?

[59] Gretzler reasserts on appeal his objections to the trial judge's refusal to give a number of his suggested jury instructions. Considering the instructions as a whole, as we must, *State v. Carr*, 108 Ariz. 203, 495 P.2d 134 (1972), we find that most of the instructions about which the defendant complains were substantially covered by the court's own instructions. If the substance of proposed instructions is adequately covered by instructions actually given by the court, there is no error in their being refused. *State v. Cookus*, 115 Ariz. 99, 563 P.2d 898 (1977). See also *State v. Melendez*, supra.

[60] Defendant's suggested instruction Number 9 read as follows:

"The testimony of any witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should always be considered with caution and weighed with great care."

This instruction was properly refused as an improper comment on the evidence. *State v. Settle*, 111 Ariz. 394, 531 P.2d 151 (1975). See Art. 6, § 27, Arizona Constitution.

[61] The trial court also refused defense instruction Number 34 which stated:

"You are instructed that where a robbery is completed prior to the death of the decedent, you may not consider the instructions concerning felony-murder insofar as determining whether the defendant is guilty of first degree murder. In other words if the robbery was completed

before the time of the Sandberg's deaths, you will find the defendant not guilty of murder first degree under the felony-murder theory."

This instruction incorrectly states the felony-murder rule which does not refer to the time of death of the victim, but focuses on whether a death-causing act is committed in the course of and in furtherance of the felony offenses. *State v. Ferrari*, supra. A felony-murder victim might well die some time after the underlying felony is completed. The trial court properly refused this instruction. *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977).

[62] In addition, Gretzler objects to certain of the instructions actually given the jury. Specifically, he challenges the court's reasonable doubt instruction and those covering voluntary intoxication and its effects on the intent element of the various crimes with which he was charged. In neither case does he give specific grounds for his objections, and we have found none.

As to the instruction on reasonable doubt, we find no error. *State v. Carr*, supra.

Neither do we find the court's intoxication instruction defective. The instruction adequately covered the impact of voluntary intoxication on the intent in the various crimes with which Gretzler was charged and correctly stated the law. *State v. Richardson*, 110 Ariz. 48, 514 P.2d 1236 (1973), cert. denied 415 U.S. 929, 94 S.Ct. 1439, 39 L.Ed.2d 487 (1974). We find no error.

OBJECTIONS TO RULINGS INVOLVING THE EXPENDITURE OF PUBLIC FUNDS FOR THE DEFENSE

Gretzler, an indigent, makes numerous claims that the court erroneously limited the expenditure of public money needed to aid the defense. The defendant was denied funds for an extra attorney, for certain out-of-state travel and investigation (some money was allowed for these purposes), and for more extensive neurological and physical examinations.

A.R.S. § 13-1673(B), now A.R.S. § 13-4013(B), allows a court in a capital case to appoint for an indigent "such investigators and expert witnesses as are reasonably necessary adequately to present his defense * * *." The Ninth Circuit Court of Appeals, in interpreting a substantially identical federal provision, 18 U.S.C. § 3006A(e)(1), has held that the fundamental issue in reviewing trial court rulings under such statutes is "whether the denial or restriction of investigative funds has substantially prejudiced the defendant * * *." *Mason v. Arizona*, 504 F.2d 1345, 1352 (9th Cir. 1974), cert. denied 420 U.S. 936, 95 S.Ct. 1145, 43 L.Ed.2d 412 (1975).

We have stated:

"A.R.S. § 13-1673(B) is not to be construed as mandating, in every case, an appointment of investigators or experts, nor the expenditure of public money for their use, merely upon application. There must be a finding, by the trial court, (1) that the defendant is unable to pay for such services himself and (2) that the appointment and expenditure is reasonably necessary to present an adequate defense. This determination, like so many others, rests in the sound discretion of the trial court. In the absence of a showing that the determination was an abuse of that discretion, it will not be disturbed on appeal. A.R.S. § 13-1673(B). *Accord, State v. Frideaux*, 207 Kan. 790, 487 P.2d 541 (1971). Cf. *Mason v. State of Arizona*, supra." *State v. Knapp*, 114 Ariz. 531, 540-41, 562 P.2d 704, 713-14 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978).

[63] Gretzler first asserts that the trial court failed to provide adequate psychiatric examinations for him. Prior to trial, Gretzler was examined by two Arizona doctors to determine his competence to stand trial and whether he was M'Naghten sane. See DEFENDANT'S COMPETENCE TO STAND TRIAL, supra. Prior to sentencing, Gretzler was given a full battery of psychological tests and examined by the diagnostic psychiatrists at Arizona State Prison, and was

given neurological tests and sleeping and waking EEG examinations. He was also granted funds and a continuance so that the defense could telephone and write a California psychiatrist in order to determine whether examination by that doctor and/or further psychiatric and neurological tests would be at all likely to produce mitigating material for the defense. The California psychiatrist did not advise that further examinations were necessary, or even particularly desirable. Gretzler never met either the conditions of A.R.S. § 13-1673(B), supra, or the conditions of Rule 11.3(f) of the Arizona Rules of Criminal Procedure, 17 A.R.S., which provides that additional expert assistance may be made available when an appointed expert advises the court that such examinations are necessary. We find no error in the court's refusal to grant further examinations. *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).

[64] Secondly, Gretzler argues that it was error for the trial court to deny some of his requests for transcripts to be provided at State expense. Voluminous transcripts were provided him and he has not shown that he was denied transcripts reasonably necessary to help his defense. We find no error.

[65] Gretzler finally contends that it was error to deny his request for daily transcripts. The court ruled:

"THE COURT: Based upon the holding of the Court in *State v. Casey* I'll deny the motion. Casey indicates that if you want a particular witness' testimony and you state why, then I can, perhaps, order that to be transcribed. So as we get into the trial, I'm going to ask that we take notes as to what witnesses are saying, and if you find you need an exact quote of a witness and would require that transcription, I can rule on it at that time.

"MR. HOFFMAN: The problem I have, I don't know if all lawyers have it, it's impossible for me to take notes when I'm examining witnesses, and the other problem I have, when I take notes when someone else is examining the witness more frequently than not I can't read my handwriting.

"THE COURT: I don't know how to help you with the latter two problems."

We find no error. *State v. Casey*, 10 Ariz.App. 516, 460 P.2d 52 (1969).

ALLEGED MISCONDUCT OF THE TRIAL JUDGE AND THE PROSECUTOR'S OFFICE

a. Should the trial judge have disqualified himself from sentencing?

On 15 September 1976, Gretzler filed a motion for change of judge, arguing that the trial judge, William E. Druke, should disqualify himself from sentencing because he was biased against the defense by publicity utilized by Stephen Neely in his campaign for Pima County Attorney, or because he involved himself in preparing that publicity. After a two-day hearing, the Associate Presiding Judge of the Pima County Superior Court denied the motion.

Stephen Neely was a deputy prosecutor in the office of the Pima County Attorney. In 1976, Neely became a candidate for the office of Pima County Attorney, and, before Gretzler had been sentenced, the Neely campaign used the Gretzler-Steelman crimes in advertising to convey the notion that Neely would be "tougher on crime" than his opponent. The advertising appeared after the jury finding of guilt. The record indicates that the trial judge never saw the published advertisements and was not aware of the additional publicity they generated until it was called to his attention by the defense.

[66] We are satisfied that Judge Druke was not prejudiced by the campaign publicity and that he in no way participated in, or approved of, the Neely advertising. The defense failed to show bias or prejudice on Judge Druke's part and was properly denied a change of judge. *State v. Myers*, supra; *State v. Neil*, 102 Ariz. 110, 425 P.2d 842 (1967).

b. Was the Pima County Attorney's Office guilty of misconduct in regard to the Neely publicity or in seeking the death penalty in Gretzler case?

[67] Prior to sentencing, the defense alleged that the prosecutor's office had abused its discretion in using the Steelman and Gretzler trials to generate pro-Neely publicity. Gretzler was unable to show that Neely's fellow prosecutors had, in fact, been involved in Neely's advertising. To the extent that Neely's fellow prosecutors may have aided him in his campaign, they did not injure the defense. The verdict against Gretzler was reached long before the Neely campaign began, and it did not prejudice the sentencing judge.

[68, 69] Gretzler urges, however, that the prosecutor's decision to seek a death penalty was an abuse of discretion and hinted that it was politically motivated. We find no reason to believe that the decision was anything other than a valid exercise of discretion. Indeed, the facts of this case are such that it would be most surprising if the State had not asked for the death penalty. The fact that a prosecutor has discretion in charging and deciding whether to ask for the death penalty does not render the imposition of capital sentences unconstitutionally arbitrary. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

DEATH PENALTY

[70] Defendant's challenge to the constitutionality of A.R.S. §§ 13-451 to -454, this State's death penalty statute, is based on contentions answered by this court in *State v. Watson*, supra.

EVIDENCE OF AGGRAVATING CIRCUMSTANCES PRESENTED AT SENTENCING

Gretzler raises seven issues concerning evidence received and findings made at the aggravation and mitigation hearing. Since Gretzler will have to be resentenced and will be entitled to a new hearing before sentencing, we need not consider these questions at this time.

CONCLUSION

The verdicts and judgments of guilt are affirmed. The sentences other than the death penalty are affirmed, and the matter is remanded for resentencing on the two murder convictions pursuant to *State v. Watson*, supra, within 90 days of the issuance of the mandate herein.

STRUCKMEYER, C. J., HOLOHAN, V. C. J., and HAYS and GORDON, JJ., concur.

126 Ariz. 92

STATE of Arizona, Appellee,

v.

Lester Eugene ROBERTS, Appellant.

No. 4898.

Supreme Court of Arizona,
In Banc.

May 19, 1980.

Rehearing Denied June 24, 1980.

Defendant was convicted in the Superior Court, Maricopa County, Cause No. CR-105381, Yale McFate, J., and he appealed. The Supreme Court, Gordon, J., held that: (1) trial court committed prejudicial error in denying defendant's motion to invoke rule on exclusion of witnesses, and (2) evidence was sufficient to support the conviction.

Reversed and remanded.

1. Criminal Law ⇐1169.1(1)

In order to warrant reversal, Arizona precedent requires that court's failure to honor request to exclude must result in prejudice to defendant.

APPENDIX B:

STATE v. GRETZLER

_____ Ariz. _____, 659 P.2d 1 (filed Jan. 6, 1983)

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

FILED
JAN 6 1983
L. ALAN COO.
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
DOUGLAS EDWARD GRETZLER,
Appellant.

No. 3750-2

Appeal from the Superior Court of Pima County
Cause Nos. A-24565 & A-24567
The Honorable William E. Druke, Judge
AFFIRMED

Robert K. Corbin, The Attorney General — Phoenix
By William J. Schafer III and Jessica Gifford,
Assistant Attorneys General
Attorneys for Appellee

Cary Sandman — Tucson
Attorney for Appellant

CAMERON, Justice

Defendant, Douglas Edward Gretzler, was sentenced to death for two counts of first degree murder, following remand for resentencing pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 475 (1979). This court has jurisdiction of this appeal

under Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

The issues raised on appeal are:

I. Is capital punishment an unconstitutionally excessive penalty for any person found to have impaired mental capacity under A.R.S. § 13-454(F)(1)?

II. Did the court's finding of two additional aggravating factors in the second sentencing proceeding violate the prohibition against double jeopardy?

III. Did the defendant commit these murders in expectation of receiving anything of pecuniary value?

IV. Is the statutory aggravating circumstance of killing in an "especially heinous, cruel, or depraved manner" unconstitutionally broad or vague, and did the defendant commit these murders in such a manner?

V. Does the Arizona death penalty statute provide adequate guidance for the use of sentencing discretion to comply with the eighth and fourteenth amendments?

VI. Is there a constitutional right to jury sentencing in capital cases?

VII. Did resentencing pursuant to State v. Watson, supra:

a. Violate the prohibition against ex post facto laws,

b. Violate double jeopardy, or

c. Constitute judicially created penalties in violation of due process and separation of powers?

VIII. Was it error to consider the defendant's prior convictions in aggravation of sentence?

IX. Does this court, in its independent review of the evidence, find that the death sentence was inappropriate punishment for this offense and this offender?

Although the facts of this case have been fully described in previous appeals, see State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980) [Gretzler I]; see also State v. Steelman, 120 Ariz. 301, 585 P.2d 1213 (1978) [Steelman I], a summary of these facts is included here as necessary for the determination of this appeal.

The defendant was convicted in the instant case of kidnapping one Vincent Armstrong, of murdering and robbing a young couple, Michael and Patricia Sandberg, and of burglarizing the couple's home. This incident comprises only a small part of a series of crimes engaged in by Douglas Gretzler and Willie Steelman in the fall of 1973, involving kidnapping, armed robbery, rape, burglary, and the murders of at least seventeen people.

This series of crimes began on 11 October 1973 when Gretzler and Steelman arrived in Arizona and during the succeeding four days robbed four persons in three separate incidents. On 17 October they next kidnapped two young men, commandeered their van, drove them to Stanislaus County, California, and murdered them. Three days later Gretzler and Steelman were hitchhiking near Petaluma, California. They kidnapped a young couple who stopped for them, with Steelman raping the female victim before the couple was released. They then returned to Arizona in a stolen car. On the way they picked up a hitchhiker, whom they murdered near the Superstition Mountains. In Phoenix, on 25 October, they murdered two more persons, a couple that had been friends of Steelman's and had seen Gretzler and Steelman in the company of the two young men murdered the week before. Gretzler and Steelman now proceeded to Tucson. While hitchhiking near Tucson on 2 November, they killed and robbed a man who stopped to give them a ride. Then began the events upon which the instant convictions and sentencing are based.

On 3 November, Gretzler and Steelman were again hitchhiking in Tucson. They kidnapped Vincent Armstrong when he stopped for them, holding him at gunpoint. Armstrong escaped, however,

by diving out of the moving automobile. He then reported his abduction and theft of his car to the police.

Gretzler and Steelman continued on in Vincent Armstrong's car to the condominium complex where the Sandbergs resided. They accosted Michael Sandberg, who was washing his automobile in the parking lot. Steelman displayed his gun to Sandberg, and the two men forced Sandberg to take them to his condominium where his wife Patricia was studying. While inside the men tried to change their appearance, forcing Pat to assist them, and trading their clothing for some of Michael's. Gretzler and Steelman then tied up the Sandbergs; the couple was put in the bathroom while their captors finished preparations to leave. Michael and Patricia were both gagged and bound, tied at the wrists with heavy twine. After about an hour in the bathroom, Patricia became so terrified that her captors gave her some of her own Valium in an attenpt to calm her down. The Sandbergs were then separated, with Patricia being placed in the living room and Michael in the bedroom; each was now also bound at the legs. Patricia was placed face down on the living room couch and was covered entirely by a blanket. Michael was placed in a crouched position on his bed, and his legs were attached with heavy twine to more twine around his neck, so that he would choke if his legs were straightened. The couple was forced to remain in these positions for some time. Gretzler then went into the bedroom and shot Michael in the head. Next Gretzler returned to the living room and shot Patricia in the head. Steelman took the gun and fired one more shot into Patricia's body, to be completely satisfied that they had killed her. Gretzler and Steelman then thoroughly wiped down the apartment in an attempt to eliminate their fingerprints. They gathered together those items in the apartment they had decided to steal, including credit cards, checks, an expensive camera, and other personal property belonging to the Sandbergs. They then took the Sandbergs' car, making their escape.

They returned to California, where, near the town of Lodi, they entered the home of a local family and forced the father

to open his safe, from which they stole between $3,000 and $4,000. Gretzler bound and gagged the four adults and three teenagers in the home, and then shot each of them to death. Afterwards, he proceeded to a bedroom where Steelman had pulled a blanket over the heads of two sleeping children. Gretzler shot one sleeping child to death, and then waited while Steelman shot and killed the other child.

Gretzler and Steelman were arrested by California authorities on 8 November 1973 in connection with the mass murder in Lodi. Each was convicted of nine counts of first degree murder. The pair was then brought to Arizona on charges arising from the Sandberg murders and Armstrong kidnapping. Each was tried separately, and each was convicted on the first degree murder and related charges. They received prison sentences for the related charges, and were sentenced to death for the murders. Their convictions, and the sentences received for the related charges, were affirmed on appeal. In light of new constitutional interpretations in State v. Watson, supra, each of their death sentences was vacated, and their cases remanded to the Superior Court for resentencing. Steelman I, supra; Gretzler I, supra. Upon remand, each was again sentenced to death. We have already reviewed and affirmed the death sentence of Steelman in State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980) [Steelman II]. While Gretzler has brought some isolated issues regarding his sentencing before this court previously on special action, State v. Superior Court of Arizona, Douglas Edward Gretzler, Real Party in Interest, 128 Ariz. 583, 627 P.2d 1081 (1981) [Gretzler II], it is our present task to examine the propriety of his resentence to death.

I

IS PARTIAL MENTAL IMPAIRMENT AN ABSOLUTE BAR TO THE DEATH PENALTY?

The jury found defendant guilty of first degree murder, rejecting his defense of insanity. Under the M'Naghten rule adopted in Arizona, the jury thus implicitly found that Gretzler

both understood the nature and quality of his actions, and knew that they were wrong. See Steelman I, supra, 120 Ariz. at 311-13, 585 P.2d at 1223-25; State v. Schantz, 98 Ariz. 200, 207, 403 P.2d 521, 525 (1965), cert. denied 383 U.S. 1015, 86 S.Ct. 628, 15 L.Ed.2d 530 (1966).

At resentencing, however, the trial judge found that the mitigating circumstance described in former A.R.S. § 13-454(F)(1), presently § 13-703(G)(1), was established -- that "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution." We thus have a situation in which defendant's mental capacity was only partially, though significantly, impaired.

While Arizona has not adopted the standard of "partial" responsibility in complete abrogation of criminal responsibility, State v. Schantz, supra, our capital sentencing statute specifically requires that significant mental impairment be taken into account as a mitigating circumstance in determining sentence. This mitigating circumstance, together with other mitigating circumstances, is to be carefully weighed against aggravating circumstances present in the case, to determine whether leniency is appropriate. Former A.R.S. § 13-454(D), presently § 13-703(E). Defendant attacks this procedure, claiming that a finding of significant impairment calls for leniency in every case, regardless of the degree of that impairment and the other circumstances of the case. Defendant contends that partial mental impairment of a defendant always renders death an unconstitutionally excessive penalty, citing the eighth and fourteenth amendments to the United States Constitution. Defendant correctly notes that the United States Supreme Court has stated that

> "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition

"of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982, 989 (1977).

Defendant does not argue that the death penalty is grossly out of proportion to the severity of the crime, and indeed it would be surprising if he did, considering the number of human lives he has taken. We need only examine, therefore, whether in this case a death sentence would serve acceptable goals of punishment.

The retributive justification of punishment has been explained in Gregg v. Georgia:

> "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law.' Furman v. Georgia, supra, at 308, 92 S.Ct. at 2726 (Stewart, J., concurring)." 428 U.S. 153, 183, 96 S.Ct. 2909, 2930, 49 L.Ed.2d 859, 880 (1976) (judgment of the Court and opinion of Stewart, Powell, and Stevens, J.J., footnote omitted). See also Furman v. Georgia, 408 U.S. 238, 452-54, 92 S.Ct. 2726, 2835-36, 33 L.Ed.2d 346, 472-74 (1972). (Burger, C.J., dissenting).

Retribution thus serves the twin purposes of reaffirming societal values regarding wrongdoing and dispensing punishment that fits the crime. As discussed above, Gretzler took innocent lives knowing the nature and quality of his acts, and knowing that he

was doing wrong. He is thus the proper subject for societal retribution. While the court may take into account defendant's somewhat diminished volitional capacities in determining proper sentence, see infra, it does not follow that partial incapacity will fully exempt defendant from society's condemnation in all instances. Such exemption is certainly not mandated in the instant case.

The second and dominant goal of punishment in our judicial system is deterrence. Our first consideration is the specific deterrence of Douglas Gretzler. As United States Supreme Court Justice White has pointed out, "It [is] clear enough that death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not." Roberts v. Louisiana, 428 U.S. 325, 354, 96 S.Ct. 3001, 3015-16, 49 L.Ed.2d 974, 993 (1976) (White, Blackmun, Rehnquist, J.J., Burger, C.J., dissenting). Incarceration is intended to serve the goal of isolation of dangerous individuals, but the prison system is a human enterprise, and thus it cannot serve this goal perfectly no matter how diligent the effort. This state has learned through sad experience that even after incarceration a violent person may become a menace to other prisoners, see e.g. State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981) (prison inmate committed violent strangulation and stabbing murder of another prisoner; he later killed yet another prisoner by burning him to death, see No. 5698, State v. Vickers), or may escape and become a menace to the public at large, see e.g. State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981), cert. denied 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981) (Greenawalt and fellow inmate Tison escaped prison and murdered four people, including a 22 month old baby). At some point a violent individual has caused so much harm and destruction of human life that society is entitled to foreclose the possibility of further deprivation.

The next consideration is that of general deterrence. Gretzler argues that, in view of his partial mental impairment, capital punishment for him will not deter other similarly

impaired persons, because such persons cannot be deterred. He further argues that punishing him in this way will not deter unimpaired persons either, because such persons cannot identify with those like Gretzler. We disagree. Gretzler's volitional impairment is only partial, and it does not follow that persons like Gretzler cannot be deterred from aberrant behavior. Also, Gretzler's mental impairment is not so substantial as to make his punishment seem meaningless to unimpaired citizens. Throughout defendant's brief, Gretzler characterizes his plight as that of a "mad man" facing execution. He is not a "mad man," however, and in fact was found sane at trial. Gretzler's condition thus does not make him an improper subject for either the retributive or deterrence justifications of punishment. Acceptable goals of punishment are served by submitting Gretzler's case to capital sentencing consideration.

In considering Gertzler's sentence, his partial mental impairment is taken into account, along with other aggravating and mitigating factors, in deciding the appropriate sentence under A.R.S. § 13-703. The eighth and fourteenth amemdments require no more. The United States Supreme Court has upheld the constitutionality of similar capital sentence statutes in other states that require the balancing of such aggravating and mitigating circumstances. Gregg v. Georgia, supra; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 423 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Further, the law upheld in Proffitt v. Florida, like the Model Penal Code section from which our statute is adopted (§ 210.6, Proposed Official Draft 1962), specifically includes partial mental impairment as one of the statutory mitigating circumstances. A finding of partial mental impairment does not bar the imposition of the death penalty. See A.R.S. § 13-703(E).

II

DOES THE FINDING OF TWO ADDITIONAL AGGRAVATING CIRCUMSTANCES ON RESENTENCING VIOLATE DOUBLE JEOPARDY?

After conviction for first degree murder, defendant originally was sentenced to death upon a finding of two statutory aggravating circumstances, based upon his nine earlier convictions for first degree murder, and no substantial mitigating circumstances. The two aggravating circumstances specifically found were former A.R.S. § 13-454(E)(1), presently § 13-703(F)(1), prior convictions for crimes punishable by life imprisonment or death, and former A.R.S. § 13-454(E)(2), presently § 13-703(F)(2), prior convictions for felonies involving the use or threat of violence. On resentencing, defendant again was sentenced to death. This time, however, in addition to the two aggravating circumstances cited above, the court found two additional aggravating circumstances. The court found that Gretzler committed the offense in expectation of receiving something of pecuniary value. See former A.R.S. § 13-454(E)(5), presently § 13-703(F)(5). Also, it found that Gretzler murdered the Sandbergs in "an especially heinous, cruel, or depraved manner." See former A.R.S. § 13-454(E)(6), presently § 13-703(F)(6). As noted above, the court additionally found as a mitigating factor that Gretzler's mental capabilities were partially impaired, see former A.R.S. § 13-454(F)(1), presently § 13-703(G)(1), but that this impairment was not "sufficiently substantial to call for leniency." See former A.R.S. § 13-454(D), presently § 13-703(E). Defendant challenges the propriety of finding the two additional aggravating circumstances on resentencing.

He first argues that these additional findings violate the double jeopardy provision of the fifth amendment, relying on Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The argument that Bullington controls cases like defendant's has been presented to, and rejected by, the Ninth

Circuit Court of Appeals in Knapp v. Cardwell, 667 F.2d 1253 (1982), cert. denied ____U.S. ____, 103 S.Ct. ____, ____ L.Ed.2d ____ (51 U.S.L.W. 3407, 29 November 1982). Bullington held that once a defendant is "acquitted" of the death penalty in a formal jury sentencing procedure resembling trial, receiving instead life imprisonment, he may not be given the death penalty in a later proceeding if his underlying conviction is reversed and he is retried. The Ninth Circuit Court in Knapp stated that, "The present case is clearly distinguishable from Bullington." Id. at 1265. It pointed out that the defendants in Knapp, including Gretzler, received the death penalty at their original sentencing, not life imprisonment. Thus, "There exists no implied 'acquittal' in the case. The sentence that can be imposed on resentencing here cannot be more severe than that previously assessed." Id. at 1265 (citation omitted).

In the instant case, the state was justified in its attempt to establish two additional aggravating factors on resentencing, as the law on both of these factors had been substantially clarified since the time of the original sentencing. In 1980 in State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), this court interpreted the "pecuniary gain" circumstance of A.R.S. § 13-454(E)(5), expressly holding for the first time that this factor was not limited to the "hired gun" situation. 126 Ariz. at 436, 616 P.2d at 896. In 1980 in Steelman II, supra, we also substantially clarified the meaning of the words "especially heinous, cruel, or depraved manner" used in A.R.S. § 13-454(E)(6), and specifically held that the Steelman/Gretzler slaying of the Sandbergs met this statutory wording. 126 Ariz. at 26, 612 P.2d at 482. These clarifications of law were not available to the judge at the initial sentencing, but were properly brought to the court's attention upon resentencing.

The purpose of the sentencing procedure is to obtain the appropriate punishment for the particular crime and the particular offender, and the trial court upon remand may take into account new interpretations of the death penalty statute

occurring between the first and second sentencing. See State v. Poland, 132 Ariz. 269, 286, 645 P.2d 784, 801 (1982). The resentencing court did not err in considering the two aggravating factors not found at the initial sentencing. However, even if we were to set aside the two additional findings of aggravating circumstances, we would hold that, considering the two aggravating circumstances previously found by the trial court and found again at the resentencing, as well as the newly found mitigating circumstance, the death penalty was properly imposed.

III

WERE THE MURDERS COMMITTED WITH THE EXPECTATION OF RECEIVING ANYTHING OF PECUNIARY VALUE?

On resentencing, the trial judge found the aggravating circumstance set out by former A.R.S. § 13-454(E)(5), presently § 13-703(F)(5):

> "5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."

In State v. Madsen, 125 Ariz. 346, 353, 609 P.2d 1046, 1053 (1980), cert. denied 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980), we stated, "A.R.S. § 13-454(E)(5) requires that the murder must have been committed for the consideration of financial gain. To comply with the statute, the receipt of the [property] must be a cause of the murder * * *." In State v. Clark, supra, also decided in 1980, we specifically elaborated that this aggravating circumstance was not limited to the "hired gun" or "contract" type killing. Rather, it involves any murder committed for a "financial motivation." 126 Ariz. at 436, 616 P.2d at 896. Accord State v. Poland, supra, 132 Ariz. at 285-86, 645 P.2d at 800-01; State v. Blazak, 131 Ariz. 598, 605, 643 P.2d 694, 701 (1981). In State v. Clark, we found that this circumstance was met, observing,

> "After killing the Thumms the appellant took their credit cards, some money, two valuable diamond rings, and their 1976 Chevrolet station wagon. The circumstances surrounding the total episode reflect that the expectation of financial gain was a cause of the murders." 126 Ariz. at 436, 616 P.2d at 896.

Similarly, in the present case, after killing the Sandbergs, the defendant took their credit cards, blank checks, an expensive camera, and their automobile. These circumstances likewise reflect a financial motivation.

More specifically, in State v. (Raymond) Tison, 129 Ariz. 546, 555, 633 P.2d 355, 364 (1981), we held that A.R.S. § 13-454(E)(5) was established where we concluded that "the homicides were committed to secure a vehicle with which to continue their flight." Gretzler and Steelman likewise murdered the Sandbergs to obtain a substitute car in which they could continue their flight. The automobile of Vincent Armstrong which they had been driving was known to the police to be stolen. In the words of Gretzler's own confession, "[W]e needed their car. So we tied them up and did them in." We find no error.

IV

IS THE AGGRAVATING CIRCUMSTANCE OF KILLING IN AN "ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED MANNER" UNCONSTITUTIONALLY BROAD OR VAGUE, AND WAS THIS CIRCUMSTANCE ESTABLISHED IN THE INSTANT CASE?

Defendant argues the aggravating circumstance established by former A.R.S. § 13-454(E)(6), presently § 13-703(F)(6), that the "defendant committed the offense in an especially heinous, cruel, or depraved manner," is unconstitutionally broad and vague. We have already considered an identical claim in another case and have held this aggravating circumstance was not defined in an unconstitutionally broad or vague manner. State v. Ortiz, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), cert. denied ____U.S. ____, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982). We have also twice pointed out that the United States Supreme Court, in Proffitt v. Florida, supra, has approved of "strikingly similar

terms" in another state's capital sentencing statute. State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1453, 55 L.Ed.2d 500 (1978); State v. Richmond, 114 Ariz. 186, 197, 560 P.2d 41, 52 (1976), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1011 (1976). In Proffitt, the Supreme Court considered Florida's statutory aggravating circumstance of "especially heinous, atrocious, and cruel." The Court stated, "We cannot say that the provision," as construed by the Florida Supreme Court, "provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-56, 96 S.Ct. at 2968, 49 L.Ed.2d at 925.

The application of such a provision may be constitutionally infirm for either of two reasons. First, a state's highest tribunal may fail to adopt a construction of its statute sufficiently narrow to make sentencing discretion "suitably directed and limited." Gregg v. Georgia, supra, 428 U.S. at 189, 96 S.Ct. at 2932, 49 L.Ed.2d at 883 (1976) (judgment of the Court and opinion of Stewart, Powell, and Stevens, J.J.) (upholding Georgia's death penalty statute). Secondly, the state tribunal may stray in an individual case from an otherwise constitutionally narrow construction. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing one individual application of Georgia's death penalty statute). Neither of these problems are present here. We believe that the statutory phrase "especially heinous, cruel, or depraved" has been construed in a constitutionally narrow fashion, and has been properly applied in individual cases. A summary of the law which has been developing in the area supports this conclusion.

Our initial interpretations of this statutory phrase recognized that the words "especially heinous, cruel, or depraved" were not intended to apply to all first degree murders. Rather, they apply to "a killing wherein additional circumstances of the nature enumerated * * * set the crime apart from the usual or the norm." State v. Knapp, supra, 114 Ariz. at 543,

562 P.2d at 716, citing State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). We have more recently reiterated that we will not allow this provision to be used as a "catch-all for those first degree murders where no other aggravating circumstance applies." State v. Ortiz, supra, 131 Ariz. at 206, 639 P.2d at 1031.

In State v. Knapp, supra, 114 Ariz. at 543, 562 P.2d at 716, we set forth the following definitions of the words heinous, cruel, and depraved:

> "heinous: hatefully or shockingly evil; grossly bad.
>
> cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration."

We have explained on numerous occasions that cruelty involves the pain and distress visited upon the victims, and that heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions. State v. Poland, supra, 132 Ariz. at 285, 645 P.2d at 800; State v. (Ricky) Tison, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981); State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1981); State v. Clark, supra, 126 Ariz. at 436, 616 P.2d at 896; State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980); State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979). We have also pointed out that "it [is] not necessary that all three elements, heinous, cruel, or depraved, be present in the murder. The statutory expression is in the disjunctive, so either all or one could constitute an aggravating circumstance." State v. Clark, supra, 126 Ariz. at 436, 616 P.2d at 896, citing State v. Ceja, supra, 126 Ariz. at 39, 612 P.2d at 495. Accord State v. Bishop, supra, 127 Ariz. at 534, 622 P.2d at 481. We therefore consider these circumstances separately.

Cruelty has been specifically defined to involve the infliction of pain on the victims. This element was appropriately

found in State v. Knapp, supra, in which defendant burned to death his two infant daughters. This court remarked, "We can hardly think of a more ghastly death than this for anyone." 114 Ariz. at 543, 562 P.2d at 716. Another example of a case in which cruelty was found is State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980), cert. denied 449 U.S. 938, 101 S.Ct. 338, 66 L.Ed.2d 161 (1980), in which the killers performed successive rapes and severe beatings on the victim prior to murdering her.

We have also stated that our concept of cruelty involves not only physical pain, but also "mental * * * distress visited upon the victims." State v. Clark, supra, 126 Ariz. at 436, 616 P.2d at 896, citing State v. Ceja, supra, 126 Ariz. at 39, 612 P.2d at 495. A case where this was found to be present is State v. (Ricky) Tison, supra, in which the victims were held by their heavily armed captors for an extended period, forced at gun-point to move from place to place, and finally had to witness the killing of other family members prior to their own deaths. We found cruelty based on the "great degree of mental pain" suffered by the victims. Id. at 543, 633 P.2d at 352. Accord Steelman II, discussed infra.

Where, however, there is no evidence that the victims actually suffered physical or mental pain prior to death, or where the evidence presented is inconclusive, we have held that cruelty was not shown. See e.g. State v. Ortiz, supra, 131 Ariz. at 210, 639 P.2d at 1035; State v. Bishop, supra, 127 Ariz. at 534, 622 P.2d at 481; State v. Clark, supra, 126 Ariz. at 436, 616 P.2d at 896; State v. Ceja, supra, 126 Ariz. at 39, 612 P.2d at 495.

In contrast to the emphasis upon the victim's suffering and feelings in the case of cruelty, the statutory concepts of heinous and depraved involve a killer's vile state of mind at the time of the murder, as evidenced by the killer's actions. Our cases have suggested specific factors which lead to a finding of heinousness or depravity.

The first such factor is the apparent relishing of the murder by the killer. In State v. Clark, supra, we found a

depraved state of mind where defendant murdered four people and then "kept a spent bullet as a grisly souvenir of his crime." 126 Ariz. at 437, 616 P.2d at 897. Similarly, in State v. Bishop, supra, we found a heinous and depraved mental state where defendant killed the victim by striking him in the head repeatedly with a claw hammer, tied him up, caused him to fall down a mine shaft, and threw rocks on the victim as he lay twitching. As defendant drove away from the scene, he turned around and waved, saying, "Good-bye, Norman. I hope we never see you again." 127 Ariz. at 534, 622 P.2d at 481. The killers in these cases clearly relished their crimes.

Another factor we have found to demonstrate a heinous or depraved state of mind is the infliction of gratuitous violence on the victim. This factor was held to be present in State v. Ceja, supra. In that case defendant shot the female victim twice in the chest, dragged her into the bedroom, and then shot her four more times in the head for no apparent reason. He shot the male victim three times, and after hisvictim had fallen, shot him once more in the back. He then began kicking the male victim in the face repeatedly, at a time when the victim was already unconscious or dead. We said,

> "We think that defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, is such an additional circumstance of a * * * depraved nature so as to set it apart from the 'usual or the norm.'" 126 Ariz. at 40, 612 P.2d at 496, quoting State v. Ceja, supra, 115 Ariz. at 417, 565 P.2d at 1278.

Closely related to the above two factors, and also demonstrating a heinous or depraved state of mind, is the needless mutilation of the victim. This occurred, for example, in State v. Vickers, supra. There, after strangling his cellmate to death, inmate Vickers carved the word "Bonzai" into the victim's back. We held that "Defendant's actions subsequent to the death of [the victim] indicate that the offense was committed

in an especially depraved manner * * * [reflecting] a mental state that is 'marked by debasement' * * *." 129 Ariz. at 515, 633 P.2d at 324. Accord State v. Smith, 131 Ariz. 29, 638 P.2d 696 (1982) (offense heinous or depraved where defendant mutilated female murder victims' breasts and sex organs).

Other factors considered by this court are the senselessness of the crime, and the helplessness of the victim. Either or both of these factors, considered together with other circumstances present in a particular case, may lead to the conclusion that an offense was heinous or depraved. For example, in State v. Tison, supra, we found the crime to be heinous or depraved, stating:

> "The senselessness of the murders, given the inability of the victims to thwart [their captors'] escape, especially in such an isolated area, and the fact that a young child, less than two years old, who posed no threat to the captors, was indiscriminately shot while in the arms of his mother, compels the conclusion that the actual slayers possessed a shockingly evil state of mind." 129 Ariz. at 543, 633 P.2d at 352.

We similarly found a heinous and depraved state of mind to exist in State v. Ortiz, supra, where after stabbing the mother to death, defendant made indiscriminate violent attacks on her three young children, attempting to stab and burn them to death. 131 Ariz. at 210, 639 P.2d at 1035.[1/] Accord State v. Clark, supra, 126 Ariz. at 436-37, 616 P.2d at 896-97 (senseless killings of former friends and co-workers, "totally without regard for human life" found depraved). The mere existence of senselessness or helplessness of the victim, in isolation, need not always lead to a holding that the crime is heinous or depraved, however. See State v. Lujan, supra, 124 Ariz. at

1/ "We have also considered acts done immediately after the actual killing to determine the murderer's mental state at the time of the killing." State v. Lujan, supra, 124 Ariz. at 372, 604 P.2d at 636.

373, 604 P.2d at 637 (defendant's killing of victim already rendered unconscious in continuing attack by other members of gang involved in robbery not "especially heinous or depraved"); State v. Blazak, supra, 131 Ariz. at 604, 643 P.2d at 700 (unnecessary killing of bystander to robbery, in addition to killing of victim of robbery, not heinous or depraved).

Where no circumstances, such as the specific factors discussed above, separate the crime from the "norm" of first degree murders, we will reverse a finding that the crime was committed in an "especially heinous, cruel, or depraved manner." See e.g. State v. Blazak, supra, 131 Ariz. at 604, 643 P.2d at 700; State v. Madsen, supra, 125 Ariz. at 352, 609 P.2d at 1052; State v. Lujan, supra, 124 Ariz. at 373, 604 P.2d at 637; State v. Brookover, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979); State v. Watson, supra, 120 Ariz. at 447-48, 586 P.2d at 1259-60.

We must then consider whether the facts here fit within our definition of the terms "especially heinous, cruel, or depraved." We have already had the opportunity to review the facts of this particular crime in light of this statutory standard in Steelman II, supra. There we held the Sandberg murders to be heinous, cruel, or depraved, concluding:

> "First degree murder is by its nature willful, cruel and repugnant. But the facts of this case set it 'apart from the norm of first degree murders.' State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979)." 126 Ariz. at 26, 612 P.2d at 482.

We believe the same result is mandated in Gretzler's case.

Michael Sandberg was kept tied up in a crouched position on his bed. A single stand of heavy parcel post twine extended up Michael's back in a V-pattern from his ankles to around his neck. It was configured in such a way as to choke Michael if his legs were straightened. He was confined in this manner for a sustained period. As we stated:

> "There can be no doubt that the victims suffered mental anguish as a result of being held prisoner for an extended period. Patricia, for example, had to take medication for her highly emotional condition as a result of being held prisoner. They knew that their captors were armed, hiding from the police, and anxious to escape. It may be inferred that throughout their imprisonment, they were uncertain as to their ultimate fate. This uncertainty had to be intensified when they were taken to separate rooms, bound and gagged." Id.

Patricia also had to endure the unimaginable terror of having her husband shot to death within her hearing, and then having to wait for her own turn to come.

The Sandbergs clearly suffered the kind of "mental and physical distress" we have held constitutes cruelty. State v. Tison, supra, 129 Ariz. at 543, 633 P.2d at 352. We thus find that this statutory aggravating circumstance is present in the instant case.

V

CONSTITUTIONALITY OF THE ARIZONA DEATH PENALTY STATUTE

Defendant next contends that the Arizona death penalty statute, former A.R.S. § 13-454, presently § 13-703, is unconstitutional because it fails to provide adequate standards to guide sentencing discretion. This issue has been previously considered and rejected by this court on numerous occasions. State v. Blazak, supra, 131 Ariz. at 601, 643 P.2d at 697; State v. Jordan, 126 Ariz. 283, 285, 614 P.2d 825, 827 (1980), cert. denied 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); State v. Mata, supra, 125 Ariz. at 241-42, 609 P.2d at 56-57; State v. Richmond, supra, 114 Ariz. at 194-95, 560 P.2d at 49-50.

Our statute, derived from the Model Penal Code (§ 210.6, Proposed Official Draft, 1962), and similar to the capital sentencing statutes upheld in Gregg v. Georgia, supra, and Proffitt v. Florida, supra, sets out specific lists of aggravating and

mitigating circumstances to be considered in capital sentencing decisions. Our statute also requires the court to consider any other relevant mitigating circumstances. We have explained that the statutory scheme is intended to "resolv[e] the need for flexibility in order to afford individualized decision-making in capital cases and the need for standards to prevent arbitrariness when unbridled discretion rests with the sentencer * * *." State v. Greenawalt, supra, 128 Ariz. at 175, 624 P.2d at 853 (1981), cert. denied 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981), citing State v. Mata, supra, 125 Ariz. at 242, 609 P.2d at 57. We have also stated that

> "the purpose of an aggravation/mitigation hearing is to determine the character and propensities of the defendant. The punishment should fit the offender and not merely the crime. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)." State v. Valencia, 124 Ariz. 139, 141, 602 P.2d 807, 809 (1979).

Our capital sentencing statute applies only to those found guilty of first degree murder, and requires the trial judge to choose either a sentence of death, or life imprisonment without the possibility of parole for twenty-five years, based on the evidence of aggravating and mitigating circumstances. Former A.R.S. § 13-454(D), presently § 13-703(E).

In view of the gravity of the death penalty, we have also held that in all capital cases, automatically appealed to this court under Rule 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S., we will conduct an independent review of all matters of aggravation and mitigation, and will decide independently whether the death sentence should be imposed in each case. State v. Richmond, supra, 114 Ariz. at 196, 560 P.2d at 51. We also conduct a proportionality review in each case to consider "whether the sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id., (citations omitted).

Where none of the statutory aggravating circumstances are found to be present, our statute prohibits the death penalty. Former A.R.S. § 13-454(D), presently § 13-703(E). See e.g. State v. Madsen, supra, 125 Ariz. at 353, 609 P.2d at 1053; State v. Lujan, supra, 124 Ariz. at 373, 604 P.2d at 637.

Where one or more statutory aggravating circumstance is found, and no mitigation exists, the statute requires the death penalty. Former A.R.S. § 13-454(D), presently § 13-703(E). See e.g. State v. Smith, supra, 131 Ariz. at 35, 638 P.2d at 702; State v. Jordan, supra, 126 Ariz. at 290, 614 P.2d at 832.

Where both aggravating and mitigating circumstances are found in a given case, the trial judge, and then this court on review, must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." Former A.R.S. § 13-454(D), presently § 13-703(E). This necessarily involves the difficult weighing and balancing of the aggravating and mitigating circumstances present. We have stated that the number of aggravating and mitigating circumstances is not dispositive, but rather their gravity:

> "The statute does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances. One mitigating circumstance, for example, may be 'sufficiently substantial' to outweigh two aggravating circumstances. The converse is also true -- one aggravating circumstance could be so substantial that two or more mitigating circumstances would not be 'sufficiently substantial to call for leniency.' A.R.S. § 13-454(D). Both the trial court and this court must then 'weigh' the mitigating circumstances against the aggravating circumstances to determine if leniency is required[.]" State v. Brookover, supra, 124 Ariz. at 42, 601 P.2d at 1326.

In arriving at a just result, the court must carefully consider all the "compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976) (judgment of the Court and opinion of Stewart, Powell and

Stevens, J.J.). In some cases the mitigating circumstances are found to outweigh the aggravating factors, and the defendant is spared the death sentence. For example in State v. Brookover, supra, defendant's impaired capacity to appreciate the wrongfulness of his conduct, caused by a medical condition (a brain lesion of a type frequently producing anti-social behavior), outweighed a prior conviction of a drug offense. 124 Ariz. at 41-42, 601 P.2d at 1325-26. The extreme youth of an offender can also be a compelling mitigating circumstance, as demonstrated recently in State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982). There, the defendant's prior convictions arising from a previous violent incident were outweighed by the fact that defendant was only sixteen years old at the time of each crime. We cited the United States Supreme Court in Eddings v. Oklahoma, which stated "chronological age of a minor is itself a relevant mitigating factor of great weight." ____U.S. ____, ____, 102 S.Ct. 869, 877, 71 L.Ed.2d 1, 12 (1982). 132 Ariz. at 250-51, 645 P.2d at 241-42. In some cases the combined weight of a number of mitigating factors outweighs the aggravation. For example, in State v. Watson, 129 Ariz. 60, 63-64, 628 P.2d 943, 946-47 (1981), the facts that the murder occurred as the result of an unexpected shootout with the robbery victim in which the victim fired first, that defendant was twenty one years old at the time of the crime, and that there was evidence defendant had done a great deal of genuine soul searching after the crime, had been a model prisoner while going through the appellate process, had set new goals for himself, and attempted to further his education in prison, outweighed his prior conviction for robbery.

In other cases, however, the mitigating factors are not "sufficiently substantial" to call for leniency. For instance in State v. Knapp, supra, defendant's lack of prior criminal record did not outweigh the extreme cruelty of burning his two children to death. 114 Ariz. at 543, 562 P.2d at 716, resentence aff'd 125 Ariz. 503, 504-05, 611 P.2d 90, 91-92 (1979). Similarly in State v. Ortiz, supra, defendant's lack of prior

criminal record did not excuse his heinous and depraved murder, involving a grave risk of death to others, in which he stabbed a woman to death and then made senseless, indiscriminate attempts to stab and burn to death her three young children. 131 Ariz. at 211, 639 P.2d at 1036. In State v. Bishop, supra, defendant's lack of prior criminal record and below average intelligence were not sufficiently substantial to outweigh the heinous and depraved killing which defendant obviously relished. 127 Ariz. at 534-35, 622 P.2d at 481-82. In like manner, in State v. Clark, supra, defendant's age (20 years old), poor home life as a child, lack of adult criminal record, and emotional problems were found insufficiently substantial to outweigh his senseless, depraved killing of four persons with total disregard of human life, and with undoubted relish, keeping a souvenir of the occasion. 126 Ariz. at 437, 616 P.2d at 897.

We feel that the statute, as interpreted by our case law, provides constitutionally adequate guidance to the trial judges in deciding whether to impose a capital sentence. As an additional safeguard, this court independently reviews the record of each capital case to determine the propriety of the sentence. State v. Richmond, supra. Where the death penalty has been erroneously imposed, we will set it aside in favor of a life sentence. See e.g. State v. Valencia, supra, 132 Ariz. at 251, 645 P.2d at 242; State v. Watson, supra, 129 Ariz. at 63-64, 628 P.2d at 946-47; State v. Madsen, supra, 125 Ariz. at 353, 609 P.2d at 1053; State v. Lujan, supra, 124 Ariz. at 373, 604 P.2d at 637; State v. Brookover, supra, 124 Ariz. at 42, 601 P.2d at 1326.

The United States Supreme Court has stated that the Florida statute, which is similar to ours,

> "* * * passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision.

> "Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law." Proffitt v. Florida, supra, 428 U.S. at 259-60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927.

We believe that our procedure likewise passes constitutional muster, and we do not agree with defendant's argument that the Arizona capital sentencing procedure is unconstitutional.

VI

RIGHT TO JURY

Defendant argues that he has a right under the sixth amendment of the United States Constitution to have a jury participate in the capital sentencing decision. This argument was rejected by the United States Supreme Court in Proffitt v. Florida, supra, 428 U.S. at 252, 96 S.Ct. at 2966, 49 L.Ed.2d at 922-23, and has also been rejected by this court on several occasions. State v. Blazak, supra, 131 Ariz. at 602, 643 P.2d at 698; State v. Schad, 129 Ariz. 557, 574, 633 P.2d 366, 383 (1981), cert. denied ____U.S. ____, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982); Steelman II, supra, 126 Ariz. at 20-21, 612 P.2d at 476-77; State v. Valencia, 121 Ariz. 191, 198, 589 P.2d 434, 441 (1979), sentence modified on other grounds 132 Ariz. 248, 645 P.2d 239 (1982); State v. Watson, supra, 120 Ariz. at 447, 586 P.2d at 1259; State v. Richmond, supra, 114 Ariz. at 196, 560 P.2d at 51.

VII

RESENTENCING UNDER WATSON

Defendant argues that his resentencing under State v. Watson, supra, violates various constitutional rights.

a. Ex post facto laws

He first argues that such resentencing violates the ex post

facto restriction of the United States Constitution. This argument was decided adversely to defendant's position in State v. Blazak, supra, 131 Ariz. at 600, 643 P.2d at 696; State v. Smith, supra, 131 Ariz. at 29-30, 638 P.2d at 696-97; State v. Schad, supra, 129 Ariz. at 574, 633 P.2d at 383; State v. Greenawalt, supra, 128 Ariz. at 174, 624 P.2d at 852; State v. Bishop, supra, 127 Ariz. at 533, 622 P.2d at 480; State v. Jordan, supra, 126 Ariz. at 286, 614 P.2d at 828; Steelman II, supra, 126 Ariz. at 20-21, 612 P.2d at 476-77; State v. Arnett, 125 Ariz. 201, 202, 608 P.2d 778, 779 (1980); State v. Watson, supra, 120 Ariz. at 453-54, 586 P.2d at 1265-66.

b. Double jeopardy

Defendant next argues that the resentencing violates the double jeopardy prohibition. We rejected this claim in State v. Blazak, supra, 131 Ariz. at 600, 643 P.2d at 696; State v. Smith, supra, 131 Ariz. at 29-30, 638 P.2d at 696-97; State v. Bishop, supra, 127 Ariz. at 533, 622 P.2d at 480; State v. Jordan, supra, 126 Ariz. at 286, 614 P.2d at 828; Steelman II, supra, 126 Ariz. at 20-21, 612 P.2d at 476-77; State v. Arnett, supra, 125 Ariz. at 202, 608 P.2d at 779; State v. Watson, supra, 120 Ariz. at 453, 586 P.2d at 1265.

c. Judicially created penalties

Defendant's last argument is that the resentencing under Watson is a judicially created penalty in violation of due process and separation of powers. This assertion has been previously rejected in State v. Blazak, supra, 131 Ariz. at 600, 643 P.2d at 696; State v. Greenawalt, supra, 128 Ariz. at 174, 624 P.2d at 852; State v. Jordan, supra, 126 Ariz. at 286, 614 P.2d at 828; State v. Mata, supra, 125 Ariz. at 241, 609 P.2d at 56.

Each of these three resentencing arguments has also been considered and rejected by the Ninth Circuit Court of Appeals in Knapp v. Cardwell, 667 F.2d 1253, 1259-64 (1982), cert. denied ____U.S. ____, 103 S.Ct. ____, ____L.Ed.2d ____ (51 U.S.L.W. 3407, 29 November 1982).

VIII

CONSTITUTIONALITY OF PRIOR CONVICTIONS

Defendant states that the trial court erred in considering his nine prior convictions for first degree murder in California, claiming that these convictions were unconstitutionally obtained. This issue was specifically decided adversely to defendant in his prior special action proceeding, Gretzler II, supra, 128 Ariz. at 585-86, 627 P.2d at 1083-84, where we held that those convictions were constitutionally obtained, and that the trial court may take them into account on resentencing.

IX

INDEPENDENT REVIEW OF SENTENCE

As stated above, this court reviews the record of each capital case to independently determine the correctness of the findings of the trial court as to aggravating and mitigating circumstances, and to independently determine the propriety of the sentence. The trial court correctly found the two statutory aggravating circumstances of former A.R.S. § 13-454(E)(1), presently § 13-703(F)(1), and former A.R.S. § 13-454(E)(2), presently § 13-703(F)(2), based on the defendant's nine prior convictions for first degree murder in California. These circumstances are respectively, previous conviction of another offense for which life imprisonment or death was imposable, and previous conviction of a felony involving the threat or use of violence.[2/]

2/ We have held that our death penalty statute is not a recidivist or enhancement statute, the purpose of which is to serve as a warning to convicted criminals and encourage their reformation. Rather,

> "We have stated that the 'purpose of an aggravation/mitigation hearing is to determine the character and propensities of the defendant. * * * Revelation of subsequent lawless acts of violence would help to attain the objectives of the sentencing statute.' State v. Valencia, 124 Ariz. 139, 141, 602 P.2d 807, 809 (1979)."

As discussed above, the judge on resentencing found two additional aggravating circumstances to be present in this case, former A.R.S. § 13-454(E)(5), presently § 13-703(F)(5) -- the defendant committed the offense in expectation of the receipt of anything of pecuniary value, and former A.R.S. § 13-454(E)(6), presently § 13-703(F)(6) -- the defendant committed the offense in an especially heinous, cruel, or depraved manner. We have already independently reviewed each of these findings, supra, and have stated our opinion that each of these aggravating circumstances was indeed present in the instant case. We need not, however, rely on these additional findings. As we have stated above, the other aggravating circumstances found at the original sentencing are sufficiently grave to support our result.

In mitigation, the trial judge found the statutory mitigating circumstance of former A.R.S. § 13-454(F)(1), presently § 13-703(G)(1), as discussed above, that defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired, but not so impaired as to constitute a defense to prosecution. We believe that the evidence, although somewhat equivocal, supports this finding of the sentencing judge. The record reflects that defendant turned to drugs at about the age of thirteen, in order to escape the daily pressures of his home environment, and used drugs continuously for a period of over nine years. There was medical testimony that this continuous use of drugs likely

---

Steelman II, supra, 126 Ariz. at 25, 612 P.2d at 481.

Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, State v. Jordan, supra, 126 Ariz. at 287, 614 P.2d at 829, or the order in which the convictions were entered. State v. Valencia, supra, 124 Ariz. at 141, 602 P.2d at 809.

Any language suggesting the contrary in State v. Ortiz, supra, 131 Ariz. at 211, 639 P.2d at 1036, is hereby disapproved. In Ortiz, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events.

impaired defendant's volitional capabilities, although it appears he can distinguish right from wrong and can exercise some control over his behavior. It thus appears that defendant's mental capabilities were significantly, but only partially, impaired.

As additional mitigation defendant has offered evidence that he had an unhappy childhood, in which his father was very demanding of achievement and gave him little approval or encouragement. He explains his turn to drugs as largely motivated by his desire to escape this parental pressure. As the United States Supreme Court has noted, "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." Eddings v. Oklahoma, supra, ____ U.S. at ____, 102 S.Ct. at 876, 71 L.Ed.2d at 11 (citation omitted). While the high court stated that such evidence is "particularly relevant" in the case of a minor, it is suggested that relatively less weight may be accorded such evidence for an adult offender. Id. We agree. Although the evidence is relevant and has been considered in mitigation, we ascribe to adult offenders such as defendant a greater degree of personal responsibility for their actions than to minors involved in crime. Defendant has also presented in mitigation evidence of his favorable adjustment to prison.

We feel that the mitigation offered by defendant Gretzler is not sufficiently substantial to outweigh the aggravating circumstances and call for leniency. We feel compelled to comment that the crime on which defendant's previous convictions are based, the cold blooded mass murder of nine persons, including the shooting of sleeping children as they lay in their beds, is more than sufficiently offensive to place the defendant well above the norm of first degree murderers. The mitigation evidence presented by defendant Gretzler is not of sufficient magnitude to outweigh the aggravating circumstances. The death sentence is appropriate in the instant case.

PROPORTIONALITY REVIEW

In addition to making an independent determination of the propriety of sentence in each capital case, the court also conducts a "proportionality review" to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." State v. Richmond, supra, 114 Ariz. at 196, 560 P.2d at 51. Accord State v. Ortiz, supra, 131 Ariz. at 206-07, 639 P.2d at 1031-32. This type of review was cited with approval by the United States Supreme Court in Gregg v. Georgia, supra, 428 U.S. at 204-06, 211-12, 223-24, 96 S.Ct. at 2939-40, 2943, 2948-49, 49 L.Ed.2d at 891-93, 895-96, 902-03, and was recently held to be required within the Ninth Circuit by Harris v. Pulley, ____F.2d ____ (9th Cir., filed 16 September 1982).

We initially note that defendant Gretzler's sentence is identical to the sentence received by his accomplice Steelman. In Steelman II, supra, Willie Steelman was also sentenced to death for his participation in the Sandberg killings. The same aggravating circumstances based on the same underlying facts were found as to Steelman (except that the pecuniary gain circumstance was not relied on because Steelman's resentencing predated State v. Clark, discussed supra). In mitigation, the judge also found that Steelman's mental capabilities were significantly impaired, on medical testimony somewhat stronger than that introduced in the present case. We found, however, that the aggravation outweighed the mitigation and affirmed the death sentence, consistent with our current resolution.

Another similar case is presented by the decisions in State v. Tison (Ricky, Raymond), supra, which also involved a multiple murder in the course of flight from the law. The same statutory aggravating circumstances found in the instant case were also found to be present there. See 129 Ariz. at 542-44, 633 P.2d at 351-53. (In mitigation these defendants argued that another member of the gang actually pulled the trigger.)

The Tison brothers also received the death penalty for their participation in these crimes on facts closely resembling the present case.

In addition, we have considered the following cases, which we find to contain resolutions proportional to the present case: State v. Clark, supra; State v. Jordan, supra; State v. Ceja, supra; State v. Evans, 120 Ariz. 158, 584 P.2d 1149 (1978), sentence aff'd 124 Ariz. 526, 605 P.2d 16 (1980), cert. denied 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119 (1980). In each of these cases the defendant both robbed and murdered their victims, and received the death penalty based on one or more of the aggravating circumstances found in the instant case, and no other aggravating circumstances.

We further find that the disposition in the instant case is not disproportionate to cases such as State v. Watson and State v. Valencia, discussed supra, in which we held that leniency was called for in light of more compelling mitigating circumstances than were present here.

We have examined the entire record for fundamental error pursuant to A.R.S. § 13-4035, and find none.

The sentence of death is affirmed.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

JACK D. H. HAYS, Justice

STANLEY G. FELDMAN, Justice

GORDON, Vice Chief Justice (Concurring in Part and Dissenting in Part):

I agree that the trial court properly found three aggravating circumstances--previous convictions of another offense for which life imprisonment or death was imposable, previous conviction of a felony involving the threat or use of violence, and that the defendant committed the offense in an especially heinous, cruel or depraved manner. I also agree that no mitigating circumstances existed sufficiently substantial to call for leniency. Therefore, I concur in the correctness of the imposition of the sentence of death in this matter. However, to be faithful to my position in State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980), I cannot agree with the majority's interpretation of the aggravating circumstance concerning pecuniary gain.

FRANK X. GORDON, JR.
Vice Chief Justice

APPENDIX C:

STATE v. SUPERIOR COURT OF ARIZONA

627 P.2d 1081 (1981)

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

FILED
MAR 31 1961
MARTHA HARRIS-YOUNG
CLERK SUPREME COURT
BY

STATE OF ARIZONA,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA, and THE HONORABLE WILLIAM E. DRUKE, JUDGE OF THE SUPERIOR COURT, DIVISION XI,

Respondent,

and

DOUGLAS EDWARD GRETZLER,

Real Party in Interest.

No. 15207

SPECIAL ACTION

PRAYER FOR RELIEF GRANTED

Stephen D. Neely, Pima County Attorney — Tucson
By David G. Dingeldine
Lynne A. Gallagher
Deputy County Attorneys
Attorneys for Petitioner

Hoffman & Brown — Tucson
By David S. Hoffman
Attorneys for Real Party in Interest

CAMERON, Justice

This special action challenges a ruling on a motion in limine by the Pima County Superior Court, precluding the State from using the defendant's nine California murder judgments as aggravating circumstances under the Arizona death penalty statute, A.R.S. § 13-703. We accepted jurisdiction because of the punishment involved, because there was no plain, adequate, or speedy remedy by appeal, and to prevent what we perceived to be a misapplication of the law. We have jurisdiction pursuant to Article 6, § 5 of the Arizona Constitution and Rule 3(c), Rules of Procedure for Special Actions, 17A A.R.S.

We must determine only one issue: Were the nine California judgments of guilt void and therefore inadmissible for enhancement of sentence in Arizona?

The facts necessary for a determination of this matter are as follows. Douglas Gretzler, defendant, and Willie Luther Steelman were responsible for the deaths of Michael and Patricia Sandberg in Tucson, Arizona, on 3 November 1973. A factual statement of defendant's conduct is contained in State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980). Later, nine persons were killed by the same pair in San Joaquin County, California. On 8 November, Gretzler was arrested in California, and a California attorney was immediately appointed to represent him. On 6 June 1974, the defendant changed his plea from not guilty to guilty before Judge Papas in the San Joaquin County Superior Court of the State of California. The plea was a result of a plea bargain in which six other charges were dismissed including one charge of kidnapping which carried a potentially greater punishment than the murders to which defendant pled guilty.

Before acepting the defendant's guilty pleas, Judge Papas

explained the charges and elements of first degree murder and advised the defendant that certain constitutional rights were waived when a guilty plea is entered. The proceeding at which defendant pled guilty appears to have complied with the procedure required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Toward the end of the proceeding the following transpired:

> "THE COURT: Now, Mr. Gretzler, and Mr. Dedekam, if it has been explained to you, all right, but if not, I would like to explain to you, that you understand that the pleas you have entered in this proceeding, of course, will not affect any other charge or charges which may be pending in any other jurisdiction? You understand that?
>
> "DEFENDANT GRETZLER: Yes.
>
> "THE COURT: This only takes care of the matters that are before this court in this county.
>
> "DEFENDANT GRETZLER: That means they do not affect either way?
>
> "THE COURT: That's right. That's correct. It has nothing to do with any other proceeding which may or has been initiated. Excuse me. I have been advised by counsel there is some proceeding in another state. And there's some proceeding in one or two other counties. Now I am not certain of that. But you understand, of course, whatever action is taken here, and your plea here does not affect those proceedings at all. You understand that?
>
> "DEFENDANT GRETZLER: Right. I understand that."

After sentencing in California, defendant was extradited to Arizona to stand trial for the Sandberg murders. Defendant was convicted of first degree murder, and following an aggravation-mitigation hearing, at which time the nine California convictions were introduced as aggravating circumstances under Arizona's death penalty statute, A.R.S. § 13-454(E)(1)(2) (presently A.R.S. § 13-703), the defendant was sentenced to death by the Pima County Superior Court. Appeal to this court followed, and we remanded

the case for resentencing pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979); State v. Gretzler, supra.

Prior to resentencing, the defendant filed a motion in limine and a motion under Rule 32, Rules of Criminal Procedure, 17 A.R.S., to preclude the State from introducing the California convictions as aggravating circumstances. Defendant alleged that he was misled by Judge Papas into believing that the guilty pleas would not affect other proceedings when, in fact, they directly affected sentencing in Arizona. The Pima County Superior Court, Judge W. E. Druke, granted the defendant's motion in limine and indicated that the California convictions would not be used as aggravating circumstances in resentencing. The State filed a petition for special action in this court.

MOTION "IN LIMINE"

In criminal cases, a motion in limine is treated as a motion to suppress, and the ruling of the trial court will not be disturbed on appeal absent a clear abuse of discretion. State v. Dupuy, 116 Ariz. 151, 568 P.2d 1049 (1977); State v. Wright, 125 Ariz. 36, 607 P.2d 19 (App. 1979). While motions to suppress are generally filed between the time of arraignment and trial in order to exclude evidence at trial, Rule 16, Rules of Criminal Procedure, 17 A.R.S., our criminal code, in A.R.S. § 13-703, requires the trial judge to hold a presentence hearing following a conviction of first degree murder to determine the existence of aggravating and mitigating circumstances. We believe that a motion in limine before sentencing should be treated in the same manner as a motion to suppress before trial, and the same standard

of review will be applied. State v. Rodriguez, 126 Ariz. 28, 612 P.2d 484 (1980).

ARE THE CALIFORNIA JUDGMENTS VOID?

The defendant asserts that the guilty pleas which resulted in the California convictions were involuntary because he was misled as to their consequences. Defendant testified at the hearing before the Pima County court that he did not know that Arizona had the death penalty, that he had not discussed the matter with his attorney, and did not know the consequences, in Arizona, of his pleas in California. He further testified that he would not have pled guilty in California had he known the convictions could be used to impose the death penalty in Arizona.

There was sufficient evidence from which it could be found by the trial court that at the time of sentencing in California, the defendant was confused, if not misled, as to the effect of his guilty pleas in California upon the imposition of the death penalty in Arizona, should he later be convicted of the charges which were then pending before the Arizona courts. The record indicates that defendant challenged the validity of the California pleas and the resulting judgments of guilt in the California courts, and he has been unsuccessful in having them set aside.

A void conviction may not be used to enhance an individual's punishment in a later sentencing. Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). The judgment in Burgett was void because the record did not affirmatively show that the defendant was represented by counsel at the time of the prior felony judgment. Likewise, the Fifth Circuit recently held that because a prior felony judgment was obtained as a result of

an involuntary confession, the judgment was void and could not be used as a prior judgment in a later case to enhance punishment because

> "[T]he record before us does not establish with 'unmistakable clarity' that the trial judge reliably determined the voluntariness of the confession." Martinez v. Estelle, 612 F.2d 173, 180 (5th Cir. 1980).

The failure of the California judge to accurately inform the defendant of the consequences in Arizona of defendant's plea in California does not, however, render the California judgments void. The law does not require a judge in one state to accurately explain the law of a sister state before a plea of guilty to a crime in the pleading state may be accepted as voluntary. The record shows that in the instant case defendant pled guilty to nine murders pursuant to a plea bargain. There was a factual determination by the California court that he was in fact guilty of those nine murders and that the pleas were voluntarily made. We find no violation of the requirements of Boykin v. Alabama, supra, in the acceptance of the defendant's pleas of guilty in the California court which would render the judgments void.

The United States Supreme Court has held that a judgment of guilt based upon a plea of guilty is not void for technical violations and is not subject to collateral attack. United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). In Timmreck, the defendant had not been informed of mandatory special parole terms of the offense to which he was pleading guilty. The court in Timmreck stated:

> "* * * His only claim is of a technical violation of the rule. That claim could have been raised on direct appeal, see McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418, but was

"not. And there is no basis here for allowing collateral attack 'to do service for an appeal.' * * * " 441 U.S. at 784, 99 S.Ct. at 2087, 60 L.Ed.2d at 638.

And the United States Court of Appeals for the Ninth Circuit has stated:

"The issues on this appeal are whether the prior conviction is in fact infirm for the failure to comply with Rule 11(f), and, if so, whether that conviction can be collaterally attacked in this proceeding, wherein the indictment for a felony violation of section 1325 is predicated upon the prior conviction. * * *

"We must affirm. The Supreme Court's recent decision in United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), effectively forecloses a defendant's right to attack collaterally a conviction in which a Rule 11 violation occurred. While Timmreck involved an attack under 28 U.S.C. section 2255, the Court's reasoning is equally applicable here: 'collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule.' (citations omitted) The result is that a conviction is not made invalid by a Rule 11 violation unless that violation is asserted on direct appeal. In this case, as in Timmreck, that was not done. Accordingly, we must affirm the conviction." United States v. Lopez-Beltran, 619 F.2d 19, 20 (9th Cir. 1979).

The California judgments were entered in good faith. There was no indication that defendant was purposely misled, or that he pled guilty to crimes that he did not commit. Any violation of the Boykin requirements was technical in nature and not made less technical by the fact that the death penalty was involved. The judgments of guilt to the nine murders are the kind of aggravating circumstances that the legislature intended the courts of this state to consider in deciding whether to impose the death penalty. The judgments are not void, Burgett v. Texas, supra, and not subject to collateral attack in Arizona. United States v. Timmreck, supra; United States v. Lopez-Beltran, supra.

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The matter is remanded to the Superior Court with directions that the motion in limine be denied. The court is further directed to hold hearings in mitigation and aggravation and to sentence the defendant within 60 days of the issuance of this court's mandate in this case.

JAMES DUKE CAMERON, Justice

CONCURRING:

FRED C. STRUCKMEYER, JR., Chief Justice

WILLIAM A. HOLOHAN, Vice Chief Justice

JACK D. H. HAYS, Justice

FRANK X. GORDON, JR., Justice

APPENDIX D:

Supreme Court's Denial of Motion for Rehearing

(February 16, 1983)

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
801 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

February 18, 1983

STATE OF ARIZONA,

Appellee,

vs.

DOUGLAS EDWARD GRETZLER,

Appellant.

Supreme Court
No. 3750-2

Pima County
Nos. A-24565 &
A-24567

The following action was taken by the Supreme Court of the State of Arizona on February 16, 1983 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - DENIED."

Copy of Order Affirming Sentence of Death enclosed, along with a copy of the modified Opinion. (See page 5 for modification.)

S. ALAN COOK, Clerk

By Arlene Bledsoe
Deputy Clerk

TO:
Hon. Robert K. Corbin, Attorney General, 1275 West Washington, Phoenix, Arizona 85007 ATTN: William Schafer III and Jessica Gifford Funkhouser
Cary Sandman, Esq., 124 West Cushing, Tucson, Arizona 85701
Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701
Douglas Edward Gretzler, Arizona State Prison, P.O. Box B-36335, Florence, Arizona 85232

RECEIVED FEB 21 1983

APPENDIX E:

U.S. CONST. AMEND. V.

Appendix E

U.S. CONST. AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval fources, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix F

U.S. CONST. AMEND. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Appendix G

U.S. CONST. AMEND. XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix H

Ariz. Rev. Stat. §13-454:

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be

considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person. Added Laws 1973, Ch. 138, § 5.

Appendix I

Ariz. Rev. Stat. §13-703.

Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years.

A. A person guilty of first degree murder as defined in §13-1105, shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in §13-1105, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the

defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances included in subsections F of this section and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, or anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be any factors profered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of §13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Amended by Laws 1979, Ch. 144, § 1, eff. May 1, 1979.

McCARTHY & SANDMAN
124 West Cushing Street
Tucson, Arizona 85701

Telephone: (602) 623-0341

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, vs. DOUGLAS EDWARD GRETZLER, Appellant	Supreme Court No. 3750-2 Pima County Nos. A-24565 and A-24567

APPELLANT'S OPENING BRIEF

CARY SANDMAN
Attorney for Appellant

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STATEMENT OF THE CASE

The Appellant's resentencing pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) is now to be reviewed by this Court. The Court previously affirmed the Appellant's convictions for burglary, kidnapping, for robbery, with a gun, 2 counts of robbery with a gun, and 2 counts of first degree murder, and all the sentences therein with the exception of the 2 counts of first degree murder. State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980). In the interim this Court reviewed the propriety of the lower Court having granted the Defendant's Motion to Suppress nine (9) California convictions which were introduced as aggravating circumstances under Arizona's death penalty statute, A.R.S. §13-454(E)(1), (2) (presently A.R.S. §13-703).

This Court reversed the lower Court's decision to suppress the prior convictions, finding that the prior convictions were not obtained in an unconstitutional manner, the lower Court's findings to the contrary notwithstanding. State v. The Superior Court of Arizona and Douglas Edward Gretzler, Real Party In Interest, 627 P.2d 1081 (1981).

Defendant's first sentencing trial pursuant to A.R.S. §13-454 (now A.R.S. §13-703) resulted in the lower Court's finding that the State had proved the existence

of the aggravating circumstances set forth in A.R.S. §13-703(F)(1)(2). Those aggravating circumstances are:

> "1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or a death was imposable.
>
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." [Formerly A.R.S. §13-454(E)(1)(2)].

At the first sentencing, the Court relied on the nine (9) California convictions, the Constitutional validity of which has been referred to above. [State v. Superior Court, supra].

Also, at the first sentencing the Court specifically found that the State was not able to prove the existence of the remaining aggravating factors then set forth in the statute. [See the Court's special verdict at the first sentencing, Nov. 15, 1976, at R 215]. The Court was unable to find the existence of any mitigating circumstances at the Defendant's first sentencing. (id.)

At the Defendant's resentencing following mitigation hearings extending over six (6) days, the Court did find the existence of mitigation, to-wit: That the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law were significantly impaired. (Special verdict of Oct. 23, 1981, at R 73 at p. 125; T.Tr. Oct. 23, 1981, at p. 69). In addition, the Court found the existence

of aggravating factors 1 and 2, associated with the Defendant's prior convictions, and further found the existence of two (2) other aggravating factors that it had specifically refused to find at the Defendant's first sentencing (id.; and T.Tr. Oct. 23, 1981, at pp. 68-69).

It is respectfully submitted that the rendition of the Appellant's crimes need not be repeated here. They have been fully set forth elsewhere. State v. Gretzler, supra. This Court's prior pronouncements with respect to this case and the case of the co-defendant (which this Court has reviewed on resentencing, State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980) intensify the enormity of counsel's task herein which is to convince this Court to shed the Appellant from his existing sentence to death.

Be that as it may, and while it would appear at first glance that the enormity of the Appellant's prior conduct would beget the most ultimate in penalties, it is respectfully submitted that this case calls into question serious and important questions regarding criminal responsibility. It is Appellant's position that the execution of persons for crimes or conduct committed when there is evidence that mental illness has contributed to a significantly impaired capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law would violate the proscriptions of the Eighth and Fourteenth Amendments to the United States

Constitution. While the legal analysis and presentation of this issue will be discussed elsewhere, the proposition is asserted herein to assist in guiding the Court in its evaluation of the evidence presented at the Appellant's mitigation hearings.

While the trenchancy of the Appellant's prior acts cry out to ignore the causative reasons for the violence and resulting loss of human life and beckon for vengeance, there should be a competing if not stronger rancor to discern the cause of the Defendant's conduct.

> "The criminal law cannot fulfill its function as a social tool if it continues to ignore the complexity of causation. Courts should not assume responsibility where there is a reason to believe that the defendant's actions were inspired by something other than abstract evil in the Miltonian area, where God and Lucifer eternally contend. Though there are great gaps in our knowledge about the causation of behavior, this does not mean that we have no such knowledge from psychiatry, sociology, anthropology, physiology and other disciplines. We are not morally justified in ignoring what we know. We often seem so intent on punishing that we don't want to be confronted with information which might make punishment seem inappropriate. We ignore scientific and common sense data as to causation in order to catch and punish the rat--always assuming there is a rat. We are content with a vast super-structure of codes, trials, prisons and so on, and do not look to see how it fits its base."
>
> [David J. Bazelon, The Concept of Responsibility, 53 Georgetown, LJ5, at pp. 8-9 (1964)].

Thus while the ignominious conduct of the Defendant might impel one to simply reject any careful examination

of the causes of the Defendant's conduct and its mitigatory potential, this case presents an opportunity to converge upon that which would lead most to turn away.

It had been hoped below to bring to bear the causative factors behind the Defendant's conduct and its mitigatory potential. The task remains the same, here. The mitigatory evidence presented at resentencing follows.

The bulk of meaningful evidence and testimony at resentencing came from THELMA SAMSON, a 75 year old retired Social Worker and Family Counselor from White Plains, New York, who had counseled the GRETZLER family during DOUGLAS GRETZLER'S early adolescence; DR. ROBERT PETRILLO, School Psychologist in the Greenburgh Central High School District of Hartsdale, New York; chiefly responsible as a Coordinator of Drug-Narcotics Education Program which he has replicated for school districts throughout the country, and who was School Psychologist at DOUGLAS GRETZLER'S High School during the years 1965 through 1969 in Tuckahoe, New York; and DR. JAMES ALBERT PEAL, Psychiatrist about whom more will follow herein in due course. [See generally the testimony of MS. SAMSON, Oct. 15, 1981, at pp. 2-27; testimony of DR. ROBERT PETRILLO, T.Tr. Oct. 15, 1981, at pp. 30-72; testimony of DR. JAMES ALBERT PEAL, at T.Tr. Oct. 19, 1981, in its entirety].

An examination of DOUGLAS GRETZLER'S very early years might have led most observers to assume that DOUGLAS

GRETZLER was a privileged member of a normal, middle-class American family. However, when DOUGLAS was thirteen (13) in 1964, he and his family were referred to the Family Consultation Service near the community where DOUGLAS grew up in Tuckahoe, New York. [T.Tr. Oct. 15, 1981, at p. 4, line 22 through p. 5, line 20]. Apparently DOUGLAS had failed very badly in the few years prior to coming to the agency. He was not a deliquency problem. He was just not performing at school and he was presenting immature behaviors. [Id. at p. 5, line 23 through p. 6, line 3].

The picture that MS. SAMSON tried to create was of a very rigid, sarcastic, cutting father that never accepted or acknowledged the worth of his son. [Id. at pp. 6-11]. The result was a very disturbed, young boy full of anger, frustration, anxiety, and depression who utilized an excessive fantasy life to cope and make life bearable. [Id. at pp. 11-12].

DOUG was always compared to his older brother and expected to measure himself by his brother's outstanding achievements. DOUG'S father so much as acknowledged this during the hearings. [T.Tr. Oct. 14, 1981, at pp. 5-11]. These problems continued after DOUG'S older brother MARK committed suicide when DOUG was about fifteen (15) years old. [Id. at pp. 11-17].

The rather bizarre frustations and inter-workings of DOUG were projected on to a one (1) page short story

he wrote in 1966 and which was entered into evidence at resentencing at Exhibit "C". [See Exhibit "C"]. Therein he expresses his feelings of never being accepted for himself, constantly being compared to his older brother MARK, his hatred for MARK and his other feelings expressing a serious anxiety and frustration with life. The last word of his short story written in 1966 is the word "Help!"

The main goals of therapy, while the family was in therapy, were to help the father provide more support and more understanding for DOUG. [T.Tr. Oct. 15, 1981, at pp. 7-8; p. 10, line 23 through p. 11, line 5]. Basically DOUG was a child who engaged in extensive fantasy to compensate for the anxiety caused by his family constellation; in order to build a life that was bearable. He was a child so filled with anger that he spent most of his time attempting to control it rather than engage in constructive behavior. [T.Tr. Oct. 13, at pp. 11-13].

Although MS. SAMSON was unable to articulate it very clearly, she did feel that the GRETZLER family constellation was different than those families with similar, common problems involving sibling rivalry, a rigid parent, etc.

"MR. SANDMAN: . . . but was there anything about this family that distinquishes it from other families you have had contact with over the many, many years you were a counselor?

MS. SAMSON: Well I think it's the incidents, itself. I guess it was MARK'S death, really, and I think it was that, when on earth, you know, that could

make a child destroy himself with so much going for him."

[Oct. 15, 1981, at p. 17, line 21 through p. 18, line 8].

"MR. SANDMAN: Was the GRETZLER family a common family?

MS. SAMSON: No. I don't think so. It was uncommon in its own background, its own potential was so much greater than many families, and when you think that it did not allow it to be a ordinary family. It had obtained some status in the community you know, looked up to.

MR. SANDMAN: What about MARK taking his own life? Would that be considered a common situation to occur in a family having common problems?

MS. SAMSON: No. No. No.

[T.Tr. Oct. 13, 1981, at p. 27, line 6 through 15].

DR. PETRILLO, the School's Psychologist at DOUG'S High School, characterized DOUG'S family constellation as bizarre as any that he had seen in 32 years of working in public schools. [T.Tr. Oct. 15, 1981, at p. 37, lines 6-8]. DR. PETRILLO'S impressions of DOUG'S father were:

"Stingy of love; rigid; <u>rigidity as I have never known it</u>; poor reality testing; just would not or could not see what I saw or what other people saw in terms of real things; ineffective as a father, as a wage earner, as a husband."

[T.Tr. Oct. 15, 1981, at p. 42, lines 3 through 7] [Emphasis supplied].

In describing the GRETZLER family residence, DR. PETRILLO stated:

: : :

"DR. PETRILLO: One day I went to the home on a site visit . . . and that was an experience to go to the home . . .

MR. SANDMAN: What was it like?

DR. PETRILLO: Like going to a wake. It was very somber, like a mausoleum. I felt like I should say a prayer. It was sad. It was very sad. There was -- I just couldn't find the richness or the warmth. I just couldn't find any sign of it in either the wallpaper, the floor, anything, the couch. I just couldn't find it."

[T.Tr. Oct. 15, 1981, p. 42, line 19 through p. 43, line 7].

Yet throughout this time, DOUG was still a boy who could generate feelings of warmth and love in others. MS. SAMSON recalled a recent conversation that she had had with one of DOUG'S prior counselors:

"MS. SAMSON: I felt always like I wanted to put my arms around him and protect him. That was the kind of feeling that DOUG elicited."

[T.Tr. Oct. 15, 1981, at p. 17, lines 1 through 3].

DR. PETRILLO'S recollection seemed to be on par with MS. SAMSON'S.

"MR. SANDMAN: What about DOUGLAS GRETZLER? What were your impressions of him?

DR. PETRILLO: DOUGLAS GRETZLER was the -- was the nicest member of the family I met. He was rich in the ability to respond, which for me is a really wonderful thing when you have that richness to respond to people or environment. I found this in no other family member so I think he was very unique . . . I just thought if there was anyone who was really alive, who had the potential, it would be DOUGLAS but

I was really unprepared to deal with the symptons he was presenting at the time, which were really a chemical abuser at the earliest of ages, which meant that the sequellae would be the longest and probably have the greatest, most deleterious affects

. . .

MR. SANDMAN: Was DOUGLAS an aggressive child?

DR. PETRILLO: No, absolutely not.

MR. SANDMAN: The opposite?

DR. PETRILLO: If anything, he was easy to smile. As I say, I remember -- my recollections were warmth, responsiveness, you know, if you gave him something that was furry, he would feel it and he would like he was feeling something furry. I don't think that response was with his parents. Either parent.

MR. SANDMAN: Your reaction to that person, hearing that that person was involved in killing other people?

DR. PETRILLO: My reaction was space cadet, freak, DOUG'S got -- finally burned himself out, complete short circuit. When I saw -- in the New York paper there was an article about that big. That's exactly what I said. That was my first reaction."

[T.Tr. Oct. 15, 1981, at p. 43, line 8 through 15; p. 44, line 19 through p. 45, line 9] [Emphasis supplied].

PAUL ZAFFO, JR., a young man that grew up with DOUGLAS in Tuckahoe, New York, and who had not seen or heard from DOUGLAS in almost ten (10) years, testified at the resentencing. When asked about the GRETZLER family, ZAFFO said:

"MR. SANDMAN: When you were little, age 10 in that era of his life, did you have contact with DOUG, his family and the siblings?

MR. ZAFFO: Yes I did.

MR. SANDMAN: I imagine you may not have thought about it at the time or intellectualized it the way I'm asking now, but looking back at those young years, what were the impressions of the GRETZLER family?

MR. ZAEFO: To take it from the kid's view, I was thrilled to get to be living where I was, because I couldn't have handled living whre he was."

[T.Tr. Oct. 15, 1981, at p. 77, lines 4 through 14].

Finally, DR. JAMES ALBERT PEAL focused on DOUG'S youth in an attempt to articulate early signs of mental illness.*

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* Dr. Peal's qualifications deserve special mention in this case. Among other things, he has been a Psychiatric Consultant to the Surgeon General of the United States, Chief of Psychiatric Services for the California Medical Facility at Vacaville, where his responsibilities included the duty to examine all the people committed from the Northern 47 Counties of California to the Department of Corrections for the offenses of murder, rape, any crimes of unusual violence, multiple murders, incest, and other offenses. He also had responsiblity for the 2,000 be facility at Vacaville which is the center of the Department of Corrections in California where all the management problems throughout the entire State are housed. Further he was responsible as the Chief Consultant to the Adult Authority with the respect to the release of those violent individuals. In addition, he served as Deputy Director of the Michigan Department of Mental Health in charge of all of the services for the mentally ill in the State of Michigan, including the hospitals for the criminally insane and including the management for the criminally insane. While serving there; as the result of an epidemic of suicides in the hospital for the criminally insane, he was instrumentally involved in revising the management treatment and committment of Court adjudication programs for the criminally insane in the State of Michigan. Complete recitation of Dr. Peal's qualifications and experience are too extensive to mention here. It should be noted that he has worked extensively in evaluating violent and dangerous offenders and when engaged in evaluations to be presented in Court, he is usually called by the Court.
(Footnote continued on following page)

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"It is my opinion that MR. GRETZLER has had a significant mental disorder for a number of years of his life. The earliest manifestations of this disorder goes back to about age thirteen.

It is my opinion the course of this mental disorder has been progressive; that the illness has increased in its manifestations with periodic periods of remission and exacerbation, and that symptomatic of this illness, the most extended use of drugs I think I have ever seen in anybody."

[T.Tr. Oct. 19, 1981, at p. 15, lines 15 through 25].

"MR. SANDMAN: Let's go back to the early stages. I think you briefly referred to your finding that this illness was present at approximately age thirteen. I want to ask you what you base that opinion on?

DR. PEAL: In the records there is evidence or there is material that suggests that DOUGLAS GRETZLER came to the attention of professionals around the age of thirteen because of poor accomplishment, poor performance at school, and the management problems at home . . .

Dr. Israel, a psychologist who examined him back in New York, has an extensive report in which he describes GRETZLER has having a major emotional disorder manifested by excessive fantasy life and poor controls, and he predicted if adequate treatment were not gotten eventually he would lose his control and develop a major psychosis.

---

continued) [T.Tr. Oct. 19, 1981, p. 11, line 20 through . 12, line 1]. Dr. Peal's qualifications are generally et forth at T.Tr. Oct. 1981, at pp. 2 through 13. He id fail to mention one additional matter that is a matter f public record which is that he is one of the few Psychi-tric Consultants in the United States to the Judges in he Social Security Administrative Appeal section.

[T.Tr. Oct. 19, 1981, p. 16, lines 21 through p. 17, lines 14].

Further emphasizing the relationship between DOUGLAS GRETZLER'S problems as a young boy and its causes, DR. PEAL stated:

"Well, in trying to understand the causes of his problems at that time and how he developed later on, one has to look at the relationship between MR. GRETZLER and his family, and the people in his family. This I did in the clinical interview, and this I also did in the record. . .

The records -- I think, and everybody kind of agrees with this, that his father was a very threatening, overbearing, strict, very compulsive individual who demanded perfection from everyone, and who put a great deal of pressure on DOUGLAS and on his brother, MARK, who committed suicide.

The extent to which this presure was experienced by GRETZLER is not really appreciated in the reports. Until you examine him and find out just what it was like to live -- for him to live as a youngster in this house growing up as he did.

He says on a daily basis his father would continually be critical of him. Not just the usual criticalness that fathers and kids have. He would describe it this way: Every day his father would come home from work, and he would call for DOUGLAS to come down and say hi to him. Once DOUGLAS would appear, then his father would begin a compulsive questioning of everything he had done that day with criticism of everything he had done or some of the things he had done at home, school, grades. And the major part of this criticism was very cutting, sarcastic, bringing DOUGLAS down, and it was a thing he could do nothing against.

His father had a Master's degree in communications, was an expert in communications, was a very brilliant man, able to do all sorts of brilliant things. . .

Early in his life, even before Dr. Israel and the other doctors saw him, he would become so discouraged and disheartened by these experiences he contemplated suicide.

In fact, he ran ways from home when he was six, only stayed a few hours on that occasion. . .

The reason he ran away was because he wanted to kill himself, because he felt if he did kill himself his father would be satisfied, would not have to contend with him."

[T.Tr. Oct. 19, 1981, at p. 20, line 10 through p. 22, line 9].

Later DR. PEAL was asked whether the particular kind of family relationship referred to herein could produce schizophrenia.

"MR. SANDMAN: Can the kind of relationship you are describing produce schizophrenia?

DR. PEAL: Yes. In the development of schizophrenia you do find a cruel, overbearing, hostile, demanding father; a milder mother; and the strong sibling competition which he had with his older brother."

[T.Tr. Oct. 19, 1981, at p. 22, lines 16 through 21].

DR. PEAL also felt that DOUG'S brother's suicide supported his thesis surrounding the pschodynamics of the GRETZLER family. [T.Tr. Oct. 19, in generally at pp. 24, line 19 through p. 28, line 10].

The picture illustrating the continued development of this disturbed child proceeds with a discussion of the drug dependence developed by MR. GRETZLER starting from the time he was approximately 13 or 14 years old.

DR. PEAL characterized DOUGLAS GRETZLER'S drug use as "the most extended us of drugs I think I have ever seen in anybody." [T.Tr. Oct. 19, 1981, at p. 15, lines 23-25].

The record indicated that DOUGLAS GRETZLER had been using major mind altering drugs on a continuous basis daily since he was about 13 years old up to the time he was arrested, extending over eight (8) years.

"DR. PEAL: DOUG'S use of drugs began when he was about thirteen. He started using barbiturates. He used the drugs pretty much at the beginning for the same reason he continued to use drugs up until the time he left home, and that was to relieve himself of the tremendous anxiety, the tension and the problems that he had relative to the pressures his father was putting on him on a day-by-day basis . . .

The barbiturates primarily relieved him of what he called the tensions of the day at thirteen . . .

At fourteen and fifteen he began to use methedrine, which is speed, the crystal. He had developed by that time some connections for methedrine. He liked it, and he kept himself on methedrine almost daily going through school and so on. This was between fourteen and fifteen . . .

About the same year he discovered the hallucinogens. This is the LSD . . . He says that the hallucinogens allowed him to escape altogether. Under the hallucinogens, he could deal with the pressures of his father without experiencing any anxiety.

MR. SANDMAN: What does it tell you about MR. GRETZLER'S personality that he was able to utilize that much LSD and cope in some fashion with reality?

DR. PEAL: The thing about his personality structure, actually the LSD kept him from developing a major psychosis, the LSD plus his high intelligence. He was intelligent enough to overcome the major effects of the drug, although it was recognized in the school by some of the school people that he was tripping every day."

[T.Tr. Oct. 19, 1981, at p. 28, line 15 through p. 29, line 1; p. 21, lines 7-12; p. 29, line 21; p. 30, lines 1 through 9; p. 30, lines 19 through p. 31, line 2].

DOUG GRETZLER'S use of drugs was largely supported by other evidence in the record. [See testimony of PAUL ZAFFO, JR., T.Tr. Oct. 15, 1981, at pp. 82 through 88; and see testimony of JOANN GRETZLER, DOUG'S sister at T.Tr. Oct. 16, p. 78, line 20 through p. 79, line 21, p. 83, lines 4 through 17].

Probably most telling was the evidence that came from the testimony of DR. ROBERT PETRILLO. At the time of his rendering testimony he was the School District Psychologist in the Greenburgh Central School District in Hartsdale, New York, chiefly responsible as the Coordinator of the Drug-Narcotics Education Program. He is also an Assistant Professor at Pace University, reigonal Instructor for a Drug Education Program for the New York State Educational Deparment and a Consultant in various towns, school districts, municipals agencies, Police Departments throughout the country on the problems of youth, especially those having to do with chemical abuse. [T.Tr. Oct. 15, 1981, at pp. 30-31]. The drug program he developed called Human Options

has been replicated (in large part due to DR. PETRILLO'S efforts) throughout the United States.

DR. PETRILLO described the spread of drugs throughout the Westchester County, New York, in the late 1960's and the way that his community reacted to it.

"DR. PETRILLO: The white, middle-class had real problems with it. They denied it. They ran from it. They strove by legalizing and decriminalizing, and a lot of other methodolgy to try to stick it back in the ghetto, but it wasn't going back to the ghetto.

Greenburgh Central was unusual. It was the first place in the State of new York that appointed a psychologist.

First of all, they were the first suburban area to acknowledge there was a drug problem in school. . .

Greenburgh, besides acknowledging the problem, went public in the press, then put their money where their mouth was and appointed a psychologist to be the drug coordinator, for want of a better term, and developed strategies and programs to intervene, and not worrying about sweeping it under the covers or throwing it back to Harlem.

MR. SANDMAN: What kind of proportions had the problem reached when you started the program?

DR. PETRILLO: I'll give you decent statistics. Heroin use was approximately four percent of our high school population. That was greater than the heroin usage in the ghetto, meaning Harlem. Harlem was running to two to three percent.

So Westchester, because of its affluence, was being reached in a meaningful way. Unfortunately most of the school districts did not come around to acknowledging it until the 70's, which really is one of the reasons I am here.

[T.Tr. Oct. 15, 1981, at p. 34, line 11 through p. 35, line 4].

DR. PETRILLO attempted to articulate throughout the hearing that his main purpose for coming to Tucson, Arizona, to testify on behalf of DOUG GRETZLER was out of a deep sense of regret that the institutions, ie., the schools and other community agencies, were completely unprepared to deal with DOUGLAS GRETZLER and the kind the problems that he was having during his attendance in school between 1964 and 1969.

"MR. SANDMAN: Tell me, if you will, what kind of intervention programs existed at the time DOUGLAS GRETZLER attended -- was it Tuckahoe High?

DR. PETRILLO: I wish I could.

MR. SANDMAN: What kind of counselling?

DR. PETRILLO: I wish I could. There was absolutely nothing. The saddest comment I could make between '64 and '69 is that instead of a program and an awareness, there was denial, suspicion. There was just nothing for the young people who might have been the phalanx of the white, middle-class who were drifting into the drug abuse scene at that time, which was real early.

MR. SANDMAN: Was DOUGLAS GRETZLER the phalanx?

DR. PETRILLO: Absolutely. DOUGLAS GRETZLER was one of the first white -- I'll use the jargon term -- one of the first white freaks that Westchester County had, and we were too unaware, too unsophisticated, too cautious to recognize it and do anything about it.

MR. SANDMAN: But you knew certain things were happening at that time to DOUGLAS GRETZLER?

DR. PETRILLO: We observed the behavior. He was dropping flags all over the place. He used the language, symbolic things.

DR. PETRILLO: You would think he was part of a civil rights movement that hadn't started, with funny hats, western boots, the whole scene.

MR. SANDMAN: What was he saying at that time? . . .

DR. PETRILLO: I go different places, I hang out with different people, I do different things than you do, like I do these things; I carry pills, these funny little pharmacopia, that he used to carry. The point was nobody wanted to look. Nobody wanted to believe.

First of all, nobody knew just what the parameters of the scene were at the time. I can't emphasize that too much. The institutions were not ready for his choice of behavior, and that's the biggest crime around, really. I wish that DOUGLAS GRETZLER was sixteen now where I work."

[T.Tr. Oct. 15, 1981, at p. 35, line 10 through p. 37, line 4]. [Emphasis supplied].

When DR. PETRILLO was asked how the changed attitudes of the institutions would now have reacted to DOUGLAS GRETZLER in High School today, DR. PETRILLO was emphatic.

"MR. SANDMAN: What were the kind of signals that he was giving to cause you to do now?

DR. PETRILLO: We would immediately, first of all diagnose it directly that this wasn't simply a case of -- through his family constellation was as bizarre as any I have seen in thirty-two years of working in public schools, but I wouldn't rest on that kind of fulcrum. The point is, we would intervene and take it for what he was telling us.

The guy was choosing chemical companions. He was choosing better living by chemistry.

We would have intervened, hounded the parents despite their rigidity,

depite their denial, in which the father is an expert beyond comparison. We would have gone to the family Court, got a Petition and forced them to be --

MR. SANDMAN: Removed from the home?

DR. PETRILLO: Absolutely.

MR. SANDMAN: Was it thinkable in 1967 and '68 to have done that for DOUGLAS GRETZLER?

. . .

DR. PETRILLO: No. Then it was like an alien thought. It was like Star Wars wasn't around. You couldn't talk to the family, a judge or cop or parent.

He could have, as he did many times, actually show drugs. We didn't know what to do. I didn't know what to do, and there was --

I'll tell you what's even sadder. There was no place to get educated. There was no one to go to to say: What do you do with a kid with red pills, green pills, doing four hundred micrograms of orange OC."

[T.Tr. Oct. 15, 1981, p. 37, line 3 through p. 38, line 12].

When asked about his feelings concerning the lack of available services, DR. PETRILLO noted:

"MR. SANDMAN: I take it you feel pretty strongly about the -- lack of available services that were available to this child.

DR. PETRILLO: I feel absolutely miserable about it.

I also have had the opportunity in the intervening decade to really understand how many trips a kid can take from the age of thirteen to thirty or thirteen to twenty-five. I don't know how old he is now.

But my business friends and I talk about this all the time. After three or four hundred trips, it's a very

distinct possibility -- I hate to think of what could happen to somebody's dura matter after being subjected to dosages and amounts like that. I really do.

That's one of the reasons why I really am -- I'm here, and I'm very concerned about our inability to deal with what was his solution for all his problems, and the institutions were lacking. We were fourteen years prehistoric."

[T.Tr. Oct. 15, 1981, at p. 39, line 22 through p. 40, line 14].

Furthermore, the literature is replete with examples of chronic drug and amphetamine use and its association with long-lasting and extensive psychosis. Chronic use of amphetamines may result in a syndrome at times indistinquishable from paranoid schizophrenia.*

DR. PETRILLO summarized his purpose in coming to Tucson as follows:

"MR. SANDMAN: What was your main purpose in wanting to come here and testify?

DR. PETRILLO: Because I really believe that DOUG GRETZLER, the heinous crime that he committed, was a result, or could have been, let me put it right, could have been the result of a damaged mind, and an impaired rationale, and an hypersuggestibility with a very heavy indication of a drug etiology.

MR. SANDMAN: What about the services that weren't available at that time? Is that

---

* For an excellent yet concise review of this subject matter, see Psychiatric Factors in Druge Abuse, Roy W. Pickens, 1979, pp. 301-319; and 33 Vanderbilt L.R. 1145, Special Project: Drugs and Criminal Responsibility particularly at pp. 1152-1154, 1167-1170.

something that --

DR. PETRILLO: I feel is criminal. I don't know who should be in the docket here. I really think that the Tuckahoe -- that we all, the area, we were so behind the times; we were so protective of ourselves, whatever, that we just weren't aware and didn't have the services, and how just a short time after he left new problems created a whole bunch of service networks which a kid like him would never fall through anymore or the chances would be very slight.

[T.Tr. Oct. 15, 1981, at p. 65, line 18 through p. 66, line 11].

Moreover, in analyzing the development of MR. GRETZLER'S illness, one should see the relationship between MR. GRETZLER'S family constellation, the cause of schizophrenia, and the subsequent involuntary use of drugs. The following should help explain:

"MR. SANDMAN: This relationship that you have testified to between MR. GRETZLER'S position within the family constellation and the cause of schizophrenia, what role does stress play in your analysis?

DR. PEAL: Basically what you are talking about when you talk about the relationship being the causative factor of the causes, you are talking about the stress that is created in GRETZLER from the relationship. There is created in him anxiety, depression, feelings of isolation, panic, because no matter what he does, he cannot satisfy the demands of his father, therefore cannot be accepted as a full member of the family. It is that continual stress that leads to isolation, panic, anxiety and, in an effort to deal with these symptoms, he utilizes drugs.

MR. SANDMAN: In that sense, do you consider the ingestion of drugs by DOUGLAS GRETZLER

to have been an entirely voluntary act on his part or not?

DR. PEAL: I do not consider the ingestion of drugs by DOUG GRETZLER as being voluntary, voluntary in the sense that people who use drugs for recreation and diversion. There is people who take mind-altering drugs just to get high, just to feel good, just to be able to be happy, to be able to party and this sort of thing. I do not consider GRETZLER'S use of drugs was voluntary in this sense of the word.

I see his use of drugs more as a desperate coping device to keep himself from losing control, to keep himself from suicide and self-destruction or to keep himself from becoming psychotic. And I think the pressure for him to take these drugs is from within him."

[T.Tr. Oct. 19, 1981, at p. 40, line 11 through p. 41, line 16].

DR. PEAL testified about DOUGLAS GRETZLER'S illness and its relationship to WILLIE STEELMAN, the Co-Defendant in this case and the tragic incidents that have led this case to come to this Court's attention. [T.Tr. Oct. 19, 1981, at p. 36, through 39].* It was DR. PEAL'S opinion that throughout the time that these homocides were committed that DOUGLAS GRETZLER was still suffering from the schizophrenic illness that he had shown signs of since age 13.

---

* Dr. Peal resides in Stockton, California, in the vicinity where the incidents leading to the Appellant's nine (9) California convictions occurred. He was called upon to examine Willie Steelman at that time and had the benefit of his previous study of Steelman in this case to further his insight into the matters relevant herein. Id.

"I think that at the time that he was with WILLIE STEELMAN that he was mentally ill. I think he was schizophrenic. I think a lot of his relationship with WILLIE STEELMAN was more a manifestation of his pathology and STEELMAN'S pathology and -- plus the utilization of drugs."

[T.Tr. Oct. 19, 1981, at p. 37, line 23 through p. 28, line 3].

DR. PEAL also emphasized that it was not the use of drugs that produced a temporary psychosis or illness in DOUGLAS GRETZLER. Rather, the bizarre behavior his illness was exacerbated by the ingestion of drugs.

"MR. SANDMAN: Let me ask you this. What risk is apparent when you have a schizophrenic, paranoid type, diseased person using these kinds of drugs, and if they are interrelated to the homicides in these cases?

DR. PEAL: There are very marked risks apparent when schizophrenics use, especially amphetamines, of which methedrine is one, and especially cocaine, both of which are mind-stimulating drugs. With the drugs, the paranoid person has a degree of alertness. Anyway, the drugs make them super, hyperalert. The drugs make them overrespond and overinterpret things which are a risk to them.

The drugs make them develop judgments that people may be of danger to them who actually are not.

They infuse panic into them, which in the studies of people who have the personality structure that GRETZLER has as demonstrated on the MMPI, result in unpredictable, violent behavior. So the drugs in paranoid schizophrenics predispose them to psychotic episodes, to panic reactions of which unpredictable violence is a part."

[T.Tr. Oct. 19, 1981, at p. 42, line 13 through p. 43, line 8].

DR. PEAL clearly felt that DOUGLAS GRETZLER'S illness brought GRETZLER within mitigating factor 13-454(F)(2), now §13-702(G)(2) of the Arizona Code in that GRETZLER'S capacity to appreciate the wrongfulness of his conduct and ability to conform his conduct to the requirements of the law was significantly impaired.

DR. PEAL also found that DOUGLAS GRETZLER was not an anti-social personality. He felt he was supported by the psychological testing that was performed by his consulting psychologist, DR. EVANS. [T.Tr. Oct. 19, 1981, at p. 48 through 58].

DR. PEAL also felt that his conclusions were supported in part by the records of the Arizona State Prison that indicated that DOUGLAS GRETZLER has been treated with major anti-psychotic drugs since 1977. [Some of these records are set forth in Exhibit "D" and further discussion concerning the drugs is set forth at T.Tr. Oct. 16, 1981, at p. 54 through 67; see also 33 Vanderbilt L.R., supra, at p. ; 1157-68].*

---

* Approximately half the patients in mental hospital are diagnosed as schizophrenics. According to a 1976 Report by the Veteran's Administration, 74% of their then hospitalized psychotic patients receive anti-psychotic medications. 78% of these patients were receiving a phenothiazine. Vanderbilt L.R., supra at n. 218. Gretzler was placed on phenothiazines, specifically stelazine, shortly after his incarceration at the prison began.

While the Court below may not have considered it, it is respectfully submitted that the prognosis for DOUGLAS GRETZLER to lead a productive, youthful life in prison is a mitigating factor that should heavily weigh in his favor in any considerations of appropriate punishment.

Best summing up DOUGLAS GRETZLER'S prognosis was DR. PEAL who stated:

> "My prognosis for DOUGLAS GRETZLER is that his illness, the schizophrenia, will go into remissions and exacerbations no matter where he is.
>
> The reality is, in my opinion, that he will be in prison all of his life, and I think he is aware of this, and he is aware of the possibilities.
>
> The prognosis for him making an effective adjustment in prison and making the maximum use of his life in terms of meaningful things to other people in prison within the prison structure, and I have worked in the prison structure in California for a number of years this prognosis, I think, is very good.
>
> GRETZLER is a very brillant person. He is a very talented person. And in the time he has been in prison he has been able to devote some of his energies to teaching other people to read, to teaching them to play the guitar, to trying to divert them from destructiveness.
>
> He is motivated to do things that he can do best as some way of making up for what he has done in the past. He is very concerned about this. His concern about what can I do to make up for the 17 people is what I think adds to the favorable pronosis.
>
> So I think on a -- I think you are dealing with someone who's probably going to be in prison all of his life, and I think what you are talking about is a useful period in which <u>he may well be able to</u>

spare as many lives as he took.

> Prison riots are bloody affairs. Those of us who work in prison know that whether or not there is destruction and the wholesale carnage as there was -- we witnessed in New Mexico is really dependent upon inmates as much as it is on staff. I think anybody in corrections will tell you this."
>
> [T.Tr. Oct. 19, 1981, p. 58, line 19 through p. 60, line 8]

DR. PEAL'S insight was clearly supported by the prison staff who testified at the sentencing trial. GREG CROSSET, his Counselor for a period of over 13 months at the Arizona State Prison, noted that DOUGLAS GRETZLER had made a commendable adjustment and could be considered a "model prisoner" within the prison system. [T.Tr. Oct. 13, 1981, at p. 17, line 5 through p. 20, line 14]. He also noted the significance of the role that model prisoners play in the successful functioning of the prison institution. [Id. at p. 20, line 15 through p. 22, line 19; see generally the testimony of DANNY MARTINEZ, Oct. 13, 1981, at p. 3, et seq. and the testimony of RICHARD CINZANO, T.Tr. Oct. 16, 1981, at pp. 10-30].

Summarily, the facts presented in the mitigation hearing present what should be somewhat obvious simply from observation of the catastrophic events that led to Appellant's arrest. That is to say, that we are herewith faced with the story of man who is mentally ill, who has been mentally ill for many, many years since his early childhood; largely as a result of causative factors related

to his family relationships and his later extensive use of drugs to cope with his illness as it developed. He was, as the evidence makes clear, quite ill throughout the course of events that resulted in a profound loss of life that seemed to follow him wherever he went during that time in his life.

The question, "who is DOUGLAS GRETZLER and why did he act the way he did", has been answered. What remains is for this Court to consider the important questions regarding MR. GRETZLER'S criminal responsibility and whether, consistent with the recongnition of those principals, this Court can order DOUGLAS GRETZLER sentenced to death.

APPENDIX K

Pima County Superior Court's Special Verdict

and Sentencing

(November 15, 1976)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

WILLIAM E. DRUKE
JUDGE, COURT COMMISSIONER
of the Superior Court

NO. A-24565
A-24567

DATE 15 November 1976

THE STATE OF ARIZONA,
PLAINTIFF

William R. Stevens
PLAINTIFF'S ATTORNEY

DOUGLAS EDWARD GRETZLER,
DEFENDANTS

David S. Hoffman
DEFENDANTS' ATTORNEYS

MINUTE ENTRY

SPECIAL VERDICT

Pursuant to the provisions of subparagraph C of A.R.S. Section 13-454, the Court hereby returns the following Special Verdict.

AGGRAVATING CIRCUMSTANCES:

1. The Court finds, and the defendant so concedes, that he has been convicted of other offenses in the United States for which under Arizona law a sentence of life imprisonment or death was imposable, i.e., nine (9) counts of First Degree Murder in the State of California.

2. The Court finds, and the defendant so concedes, that the nine (9) counts of First Degree Murder in the State of California constitute previous felony convictions in the United States involving the use or threat of violence on other persons.

3. The Court does NOT find the existence of any of the aggravating circumstances set forth in numbered paragraphs 3, 4, 5, and 6 of subparagraph E of A.R.S. Section 13-454.

MITIGATING CIRCUMSTANCES:

The Court does NOT find the existence of any of

Rosemarie Chastain, Deputy Clerk.

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MINUTE ENTRY

Page No. 2 Date 15 November 1976 Case No. A-24565
A-24567

the mitigating circumstances set forth in numbered paragraphs 1, 2, 3 and 4 of subparagraph F of A.R.S. Section 13-454.

IT IS ORDERED that sentencing be set for 4:00 P.M. on 15 November 1976 in Division XI.

JUDGE

cc:

County Attorney - Wm. R. Stevens

Hoffman, Anderson & Brown

Court Administrator

Hon. W. E. Druke

Sheriff of Pima County

Rosemarie Chastain, Deputy Clerk.

NOV 17 1976

FILED

15 November 1976
NORMA M. FELIX, Clerk
Rosemarie Chastain, Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

WILLIAM E. DRUKE
JUDGE, ~~COMMISSIONER~~
of the Superior Court

NO. A-24565
A-24567

DATE 15 November 1976

THE STATE OF ARIZONA,
PLAINTIFF

William R. Stevens
PLAINTIFF'S ATTORNEY

DOUGLAS EDWARD GRETZLER
DEFENDANT

David S. Hoffman
DEFENDANT'S ATTORNEY

MINUTE ENTRY

SENTENCING:

Defendant present in custody

Herman Stein reporting.

The defendant having heretofore entered a plea of "Not Guilty" as to all charges, and a verdict of "Guilty" as to all charges having been returned by the jury,

IT IS THE JUDGMENT OF THE COURT that the defendant is GUILTY of the following crimes, all of which are felonies and were committed by the defendant on 3 November 1973:

CAUSE NO. A-24565

First Degree Murder of Michael Sandberg.

First Degree Murder of Patricia Sandberg.

Second Degree Burglary While Armed With A Gun.

Robbery While Armed With A Gun.

CAUSE NO. A-24567

Kidnapping Not Resulting In Serious Bodily Harm.

Robbery While Armed With A Gun.

The Court reads the Special Verdict heretofore returned by it earlier this date and of which respective counsel were delivered

Copy received at ____ M
this ____ day of _____, 19____

Deputy Sheriff

Rosemarie Chastain, Deputy Clerk.

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a copy. Mr. Hoffman states his objections thereto.

The defendant is granted leave to address the Court on his own behalf.

No legal cause appearing why sentence should not now be imposed,

IT IS THE JUDGMENT OF THE COURT that the defendant be SENTENCED TO DEATH for the crime of First Degree Murder, two counts, committed on 3 November 1973, the Court finding no mitigating circumstances sufficiently substantial to call for leniency.

IT IS THE FURTHER JUDGMENT AND SENTENCE OF THE COURT for the crimes of Robbery While Armed With A Gun, two counts, Second Degree Burglary While Armed With A Gun, and Kidnapping Not Resulting In Serious Bodily Harm, all of which were committed on 3 November 1973, that the defendant be incarcerated in the Arizona State Prison for not less than twenty-five (25) nor more than fifty (50) years to date from 8 November 1973, the Court having given consideration to and credit for the time spent by the defendant in custody.

Pursuant to Rule 26.15, Arizona Rules of Criminal Procedure (1973), 17 A.R.S.,

IT IS ORDERED that the Clerk of the Court forthwith file a notice of appeal from the foregoing Judgment and Sentence.

IT IS FURTHER ORDERED that David S. Hoffman, Esq., be appointed to represent the defendant on appeal.

IT IS FURTHER ORDERED that the receipt of a signed, certified copy hereof shall constitute sufficient authority for the Sheriff of Pima County to detain and thereafter transport the defendant to the Arizona State Prison, and for the Warden thereof to receive the defendant for execution of the foregoing Judgment and Sentence.

JUDGE

Rosemarie Chastain, Deputy Clerk.

cc:
County Attorney
Hoffman, Anderson & Brown
Court Administrator
Adult Probation (2)
Pima County Sheriff (2 certified)
Arizona State Prison (2 certified)
Dept. of Public Safety
Dept. of Corrections
Hon. W. E. Druke (2)

APPENDIX L:

Pima County Superior Court's Findings of Fact and Conclusions of Law re: Defendant's Prior California Convictions

SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

W. E. DRUKE
JUDGE/COURT COMMISSIONER

NO. A-24565
A-24567

DATE 24 November 1980

THE STATE OF ARIZONA,
PLAINTIFF

PLAINTIFF'S ATTORNEY

DOUGLAS EDWARD GRETZLER,
DEFENDANT

DEFENDANT'S ATTORNEY

MINUTE ENTRY

DEFENDANT'S MOTION IN LIMINE RE: CALIFORNIA CONVICTIONS:

The Court having taken the matter under advisement and finding:

1. That prior to his extradition for and conviction of two counts of first degree murder in Pima County, Arizona, the defendant was convicted of and received concurrent life sentences for nine counts of first degree murder in San Joaquin County, California.

2. That the California convictions resulted from the defendant's change of plea on 6 June 1974 before the Honorable Chris Pappas, Judge of the Superior Court of the State of California.

3. That prior to pleading, both the defendant and his court-appointed attorney, Mr. George Dedekam, knew there were first degree murder charges pending against the defendant in Arizona, and that it had a death penalty statute.

4. That after being advised that life sentences were the direct consequence of his guilty pleas, Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the defendant was also advised of the following by Judge Pappas after a bench conference with counsel:

--

JAMES CORBETT Clerk

By R. Jones
Deputy

"THE COURT: Now, Mr. Gretzler, and Mr. Dedekam, if it has been explained to you, all right, but if not, I would like to explain to you, that you understand that the pleas you have entered in this proceeding, of course, will not affect any other charge or charges which may be pending in any other jurisdiction? You understand that?

"DEFENDANT GRETZLER: Yes.

"THE COURT: This only takes care of the matters that are before this court in the county.

"DEFENDANT GRETZLER: That means they do not affect either way?

"THE COURT: That's right. That's correct. It has nothing to do with any other proceeding which may or has been initiated. Excuse me. I have been advised by counsel there is some proceeding in another state. And there's some proceeding in one or two other counties. Now I am not certain of that. But you understand, of course, whatever action is taken here, and your plea here does not affect those proceedings at all. You understand that?

"DEFENDANT GRETZLER: Right. I understand that."

5. That by being so advised, the defendant was misled and/or misinformed as to the consequences of his guilty pleas inasmuch as the convictions thereon will affect the instant proceedings by being offered in evidence to establish the first two aggravating circumstances set forth in subsection F of A.R.S. §13-703, to wit:

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

R. Jones, Deputy Clerk.

"2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person."

6. That the defendant's guilty pleas to nine counts of first degree murder in California were not, therefore, knowingly, intelligently and voluntarily made, and the convictions thereon are constitutionally infirm.

7. That in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), the Arizona Supreme Court recognized that

"(a) state may not use a prior conviction to enhance punishment for a later conviction if the prior conviction was obtained in a constitutionally infirm manner. Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967)." 120 Ariz. at 448.

8. That subsection C of A.R.S. §13-703 also provides that

" . . . the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials."

IT IS THEREFORE ORDERED granting the defendant's Motion in Limine to preclude consideration of the defendant's first degree murder convictions in the State of California as aggravating circumstances.

COPIES TO:
County Attorney - David Dingeldine and Lynne Gallagher
Hoffman and Brown
Court Administrator
Hon. W. E. Druke
Under Advisement Clerk

Rosemarie Jones, Deputy Clerk

APPENDIX M:

Pima County Superior Court's Sentencing

(October 23, 1981)

23 Oct 1981
JAMES N. CORBETT, Clerk
R. Jones
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

NO. A-24565
A-24567

W. E. DRUKE
JUDGE/COURT COMMISSIONER

DATE 23 October 1981

THE STATE OF ARIZONA,
PLAINTIFF

Lynne Gallagher
PLAINTIFF'S ATTORNEY

DOUGLAS EDWARD GRETZLER,
DEFENDANT

Cary Sandman
DEFENDANT'S ATTORNEY

ORAL ARGUMENT AND MINUTE ENTRY

S E N T E N C I N G:

Lee Kinney reporting.

Defendant present, in custody.

Counsel argue to the Court.

SPECIAL VERDICT

Pursuant to the provisions of A.R.S. Section 13-454, the Court hereby returns the following Special Verdict.

AGGRAVATING CIRCUMSTANCES:

1. The Court finds that the defendant has been convicted of other offenses in the United States for which under Arizona law a sentence of life imprisonment or death was imposable, that is, the nine (9) counts of First Degree Murder in the State of California.

2. The Court finds that the defendant's convictions for the nine (9) counts of First Degree Murder in the State of California constitute previous felony convictions in the United States involving the use or threat of violence on other persons.

3. The Court finds that the defendant committed the offenses as consideration for the receipt, or in consideration of the receipt, of anything of pecuniary value.

RECEIVED OCT 23 1981

Copy received at 1650 hrs
this 23 day of OCT, 1981
M. L. Wheeler #11
Deputy Sheriff

JAMES CORBETT, Clerk
By Rosemarie Jones
Deputy

4. The Court finds that the defendant committed the offenses in an especially heinous, cruel, or depraved manner.

The Court does NOT find the existence of any other aggravating circumstances set forth in subparagraph E of A.R.S. Section 13-454.

MITIGATING CIRCUMSTANCES:

While the Court does find mitigating circumstances in that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law were significantly impaired, the Court is unable to find that this mitigating circumstance is sufficiently substantial to call for leniency.

All parties are granted leave to address the Court.

No legal cause appearing why sentence should not now be imposed,

IT IS THE JUDGMENT OF THE COURT that the defendant be SENTENCED TO DEATH for the two (2) counts of First Degree Murder committed on 3 November 1973.

Pursuant to Rule 26.15, Arizona Rules of Criminal Procedure,

IT IS ORDERED that the Clerk of the Court forthwith file a notice of appeal from the foregoing Judgment and Sentence.

IT IS FURTHER ORDERED that the receipt of a signed, certified copy hereof shall constitute sufficient authority for the Sheriff of Pima County to detain and thereafter transport the defendant to the Arizona State Prison, and for the Warden thereof to receive the defendant for execution of the foregoing Judgment and Sentence.

IT IS FURTHER ORDERED that the Pima County Sheriff not transport the defendant to the Arizona State Prison until 27 October 1981, to give counsel an opportunity to confer with his client.

FILED IN COURT: Notice of Appeal

JUDGE

Rosemarie Jones, Deputy Clerk.

APPENDIX N:

KNAPP v. CARDWELL

667 F.2d 1253 (9th Cir. 1982)

Dissenting Opinion of Judge Adams

Knapp v. Cardwell
No. 80-5419

FILED
JAN 19 1982

CLERK, U.S. COURT OF APPEALS

ADAMS, Circuit Judge, concurring in part and dissenting in part.

I join with the majority in all respects but one, namely, the validity of the resentencing procedures which permit the new sentence to rest on findings of aggravating circumstances that were found, in the first sentencing proceeding, not to be present in the crime. The majority asserts that reconsideration of any such circumstances would not constitute double jeopardy. Guided by the interpretation of the double jeopardy clause recently advanced by the United States Supreme Court in Bullington v. Missouri, 68 L. Ed. 2d 270 (1981), I would permit reconsideration only of a narrower class of such aggravating circumstances -- those that do not rest on evidence similar in nature to that supporting a conviction or acquittal of a crime. Because the record does not make clear whether on resentencing a death sentence had been imposed on any of the defendants in reliance on what I would consider an impermissible new finding of an aggravating circumstance, I would remand to the district court for such a determination.

Although it addresses a different factual situation, Bullington v. Missouri is, as the majority recognizes, relevant to the problem we face here. In Bullington, the defendant had been convicted of first-degree murder and sentenced to life imprisonment, but a new trial was granted because of constitutionally defective jury selection. At the second trial, Bullington was again convicted. At his second sentencing proceeding, the prosecution again sought the imposition of the death penalty, even though the sentencing jury at the first sentencing proceeding had not found the aggravating and mitigating circumstances to warrant

to establish beyond a reasonable doubt its case that the death penalty was warranted. Because the Supreme Court considered that determination to be the functional equivalent of an acquittal of criminal charges, it held that the Missouri Supreme Court, by exposing Bullington to the risk of a death sentence in the second hearing after the State had failed to prove its case in the first hearing, had contravened the double jeopardy clause. 68 L. Ed. 2d at 278-84.[2]

The defendants in the present case each received a death sentence at the first hearing; unlike Bullington, they were not exposed to the possibility of a harsher sentence at the second hearing. However, the majority would permit some of the defendants here to be subjected at their second sentencing procedure to reconsideration of all explicit findings originally made in their favor, even though, if all mitigating circumstances had properly been considered the first time, those findings might have resulted in a life sentence rather than death at the first hearing. Although, because of the narrowness of its holding, Bullington may be of uncertain application outside the facts of its specific environment (a sentence of life at the first hearing, followed by the possibility of a death sentence at the second hearing), the reasoning of that case would appear incompatible with the majority's holding here, even though the defendants here were not exposed to the risk of harsher sentences at the second hearing than they actually received at the first.

---

2. The four dissenting Justices in Bullington agreed that the crucial question for double jeopardy purposes was whether the sentencing determination was sufficiently akin to an acquittal. However, the dissenters contended that a life sentence in the Missouri proceeding did not constitute an implicit acquittal of any charge, and would have held the double jeopardy clause inapplicable because resentencing did not expose the defendant to a renewed "possibility of error as to guilt or innocence." 68 L. Ed. 2d at 285-87 (Powell, J., dissenting).

a sentence of death. The Supreme Court of Missouri ruled that the prosecution could seek the death penalty the second time, and Bullington appealed.

In reviewing the Missouri Supreme Court ruling, the United States Supreme Court reaffirmed its earlier holdings that resentencing within the limits existing at the time of the first sentence generally does not implicate the double jeopardy clause. Id. at 276. See, e.g., United States v. DiFrancesco, 449 U.S. 117 (1980); North Carolina v. Pearce, 395 U.S. 711 (1969). And the Court reaffirmed Stroud v. United States, 251 U.S. 15 (1919), where the imposition of a death sentence on resentencing following an initial life sentence was held not to violate the double jeopardy clause. But the Supreme Court in Bullington distinguished those earlier cases, and other similar cases, on the ground that they had addressed situations in which the sentencing was essentially discretionary, so that a lesser sentence could not be construed as an acquittal of any factual charge. The Bullington majority considered the features of the Missouri death sentencing procedure to be significantly different from the normal sentencing procedure[1] and inferred from those special features that a sentencing jury's imposition of a life sentence rather than a death sentence was in effect a finding that the State had failed

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1. In particular, the Supreme Court noted that under the Missouri arrangement the sentence was imposed by a jury that was confined to two choices -- life imprisonment or death -- and was guided in its choice by articulated standards. The Court emphasized that the jury could not impose the harsher penalty unless the prosecution met "the burden of establishing certain facts beyond a reasonable doubt," and observed that the structure of the hearing strongly resembled that of a trial. 66 L. Ed. 2d at 278-79 & n.10.

Indeed, in some ways the double jeopardy question in the present situation may even be less troublesome than that confronted in Bullington. The Supreme Court there appeared to be concerned with ascertaining the extent to which the life sentence constituted an acquittal of factual allegations rather than an exercise of discretion. The Court placed great emphasis on the trial-like nature of the Missouri death sentencing procedure precisely because that similarity supported the inference that a life sentence arising out of the proceeding was in effect an acquittal of the factual predicate for a death sentence. 68 L. Ed. 2d at 278-84. See Comment, The Supreme Court Term, 1980, 95 Harv. L. Rev. 91, 118 (1981). Here we are not confronted with the task of uncovering the precise predicate of a sentence; rather, in the present situation we have explicit factual findings of the sentencing judge at the initial hearing as to the existence or nonexistence of each enumerated aggravating circumstance. See Ariz. Rev. Stat. § 13-454(C), amended and recodified at § 13-703(D).[3] Some of these findings, such as those going to

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3. Section 454(C) provided:

> The Court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

To decide that these findings, in effect, constitute acquittals, therefore, we would not be limited to the inferences one could draw from any similarity between the Arizona sentencing procedure and a trial. The explicitly factual nature of the findings present much stronger evidence of their import than does the inferential evidence on which the Bullington court was required to rely. Nevertheless, the Arizona death sentencing scheme is quite similar to the Missouri procedure in the respects emphasized in Bullington. Although in Arizona the sentence is rendered by a judge rather than a jury, the judge is limited in a number of

(continued)

heinousness, pecuniary motive, or risk of death, would normally rest on evidence similar in nature to that supporting a conviction or acquittal on guilt. If the life sentence in Bullington constituted, for purposes of double jeopardy, an "acquittal" of aggravating circumstances that would be necessary to sustain a death sentence, it is difficult to suggest -- as does the majority -- that an explicit finding at a sentencing hearing as to the nonexistence of an aggravating circumstance, when that finding rests on evidence similar to that which would be adduced at trial, is not an "acquittal" of that aggravation, and of any death sentence based even in part on that aggravation.

Following a finding, resting on factual evidence presented at a sentencing hearing, that an aggravating circumstance did not exist, the reasoning in Bullington would appear to militate against permitting the prosecution a second chance to prove that the aggravating circumstance did exist and justified the imposition of the death penalty. This would most clearly be so where the State wished to establish at the second hearing the existence of an aggravating circumstance that took place before the initial sentencing hearing, but that the State,

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3. (continued)

crucial respects. In particular, the sentencing judge may find an aggravating circumstance to be present only if the circumstance has been shown beyond reasonable doubt to have existed. State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980). The judge imposes the sentence only after a hearing at which evidence may be submitted by both the prosecution and the defense, and "the admissibility of information relevant to any of the aggravating circumstances . . . shall be governed by the rules governing the admission of evidence at criminal trial." Ariz. Rev. Stat. § 13-902(C). Although we do not face here a challenge to a death sentence imposed in place of an initial life sentence, it would appear that in such a case a life sentence imposed under the Arizona procedure, like a life sentence imposed under the Missouri scheme, might well constitute an implicit acquittal of the requisites for a death sentence even in the absence of the express factual findings involved in this case.

for whatever reason, had failed to establish initially. For example, in the case of appellant Jordan, the aggravating circumstances that had justified the initial imposition of the death sentence had consisted solely of several prior convictions. On resentencing, the judge also found that the specific crime for which he was being sentenced had been heinous and for pecuniary gain.[4] But if the State wished to introduce sufficient evidence to establish that, say, "the defendant committed the offense in an especially heinous, cruel, or depraved manner," Ariz. Rev. Stat. § 13-902(E)(6), it had at the first sentencing hearing its "one fair opportunity to offer whatever proof it could assemble," Bullington v. Missouri, 68 L. Ed. 2d at 283; Burke v. United States, 437 U.S. 1, 16 (1978); Bullington would appear to hold that "the State is not entitled to another." 68 L. Ed. 2d at 283. A new opportunity to show the existence of that aggravating circumstance would provide the same sort of repeated attempt to convict that the Supreme Court in United States v. DiFrancesco, 449 U.S. 117, 136 (1980), observed to be absent in the ordinary resentencing situation.[5]

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4. In affirming Jordan's sentence, the Arizona Supreme Court disregarded the additional findings of aggravating circumstances, noting that no mitigating circumstances had been found and that the presence of at least one aggravating circumstance other than those newly found was sufficient under the statute to call for imposition of the death penalty. State v. Jordan, 614 P.2d 825 (1980).

5. The majority suggests that such a bar would constitute "collateral estoppel," and that if invoked must, under the concept of mutuality, bind the defendant as well as the prosecution to any unfavorable factual findings that were not tainted by the defects requiring resentencing. Typescript op. at 16 n.11. But the concept of mutuality would not appear to apply in this sort of "collateral estoppel." This is so because double jeopardy is a constitutional doctrine that provides the defendant with protections not afforded the prosecution -- one of the ways in which "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself," Addington v. Texas, 441 U.S. 418, 423-24 (1979).

It is not clear from the record, especially because at the time of argument resentencing of some of the appellants had apparently not been completed, whether any appellants have been sentenced to death on the basis of a finding of a new aggravating circumstance resting on factual evidence that could have been adduced at the first trial, or whether any appellants are currently defending allegations of such aggravating circumstances in the course of ongoing resentencing proceedings. It does appear that at least one appellant, Valencia, has been sentenced to death on the basis, in part, of a separate conviction that was rendered subsequent to the initial sentencing hearing. State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979). This sort of aggravating circumstance, however, presents a significantly different question from that posed by most of the aggravating circumstances under the Arizona statute.

One crucial distinction is that, in a case such as Valencia's, the new finding of an aggravating circumstance is based on an event occurring after the initial sentencing hearing. North Carolina v. Pearce would suggest that, at least in an ordinary sentencing proceeding (i.e., one not involving capital punishment), this new conviction could be considered by the judge on resentencing because it took place after the first sentencing proceeding. See 395 U.S. at 726. On the other hand, it appears that Bullington might foreclose a prosecutor in Missouri from seeking a death sentence on resentencing, even if a separate conviction had been rendered in the interim, once the initial sentencing jury had sentenced the defendant to life imprisonment. But neither Pearce nor Bullington provides clear guidance in a case such as Valencia's, where consideration of a conviction -- previously found by the sentencing judge not to exist -- cannot lead to a sentence harsher than that meted out intially. In the absence of such guidance, I would rely, as did the dissenting

Justices in Bullington, on the general concerns underlying the double jeopardy clause -- specifically, the concern that relitigation of factual issues may impose an unwarranted burden on the defendant and increase the risk of an erroneous finding of guilt. See 68 L. Ed. 2d at 586-87 (Powell, J., dissenting).

This concern illuminates a second, and more fundamental distinction in sentencing proceedings between the aggravating circumstance of intervening criminal convictions and other sorts of aggravating circumstances. In the situation before us, it does not appear that consideration of intervening criminal convictions increases the chance of erroneous findings. Introduction of intervening convictions at resentencing does not afford the prosecution with more than one opportunity to introduce such evidence, nor does it require the defendant to litigate an issue which he legitimately could have considered to be closed. Moreover, a sentencing judge's initial finding that the defendant has not been convicted of another felony -- unlike a finding with respect to other sorts of aggravating circumstances -- bears little resemblance to an acquittal. A finding with respect to heinousness, for example, would normally require consideration of a number of factual matters that would have to be inferred from the record or from testimony. Disproving a charge of heinousness might prove difficult and onerous for a defendant, just as disproving guilt at trial would be. But a finding as to a prior conviction is different in nature from a finding as to heinousness: a prior conviction is generally a matter of public record, and usually requires little factual inquiry.

Under the standards set out in Bullington, I do not believe that a finding as to the non-existence of other convictions can be deemed an acquittal, at least with respect to other convictions rendered after the initial sentencing hearing but before resentencing. I am persuaded, however, that findings

as to other sorts of aggravating circumstances, with factual predicates that are not a matter of official public record, do constitute "acquittals" for double jeopardy purposes. Because it appears[1] possible that some of the appellants may have been sentenced in reliance on, or may now be forced to defend against, new findings of aggravating circumstances of the latter type, I would remand to the district court the cases of those appellants who have been resentenced subsequent to Batson for a determination whether the procedures by which they have been or are being resentenced violate the double jeopardy clause.

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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF ARIZONA)
: ss.
COUNTY OF PINAL)

I, DOUGLAS EDWARD GRETZLER, being first duly sworn, depose and say that I am the petitioner in the instant Petition for Certiorari, that I am the appellant in No. 3750-2 in which the Arizona Supreme Court affirmed my judgment and conviction and in which the Arizona Supreme Court denied a Motion for Rehearing, that in support of my motion to proceed on the Petition for Certiorari without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; and that I believe I am entitled to redress.

I further swear that the response which I have made to the questions and answers below relating to my ability to pay the cost of prosecuting the petition for certiorari are true.

1. Are you presently employed?

ANSWER: No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form or rent payment, interest, dividents, or other source?

ANSWER: No.

3. Do you own any cash or checking or savings accounts?

ANSWER: No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: No.

5. I have been in the custody of the Arizona Department of Corrections since November, 1976, and remain so at this time.

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McCARTHY & SANDMAN
Attorneys at Law
122 West Cushing St.
Tucson, AZ 85701

I understand that a false statement or answer to any question in this affidavit will subject me to penalities of perjury.

Douglas Edward Gretzler

DOUGLAS EDWARD GRETZLER

SUBSCRIBED AND SWORN to before me this 11 day of April, 1983, by Douglas Edward Gretzler.

Notary Public

My Commission Expires:
My Commission Expires April 30, 1984